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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

GENE A. FOLDEN, COASTAL COMMUNICATIONS ASSOCIATES, AND JUDITH A. LONGSHORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the United States Court of Federal Claims have subject-matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), to render judgment on common-law claims against the United States for money damages alleging the Federal Communications Commission ("FCC") breached implied-in-fact contracts to award licenses by lottery in accordance with its lottery rules?

Does the exclusive appellate jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to review final FCC decisions and orders in licensing cases under § 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b), preempt the exclusive original jurisdiction of the Court of Federal Claims under the Tucker Act to render judgment on claims for money damages alleging that the FCC breached implied-in-fact contracts?

PARTIES TO THE PROCEEDING

Petitioners are Gene A. Folden, Coastal Communications Associates, and Judith A. Longshore.

Respondent is the United States of America.

RULE 29.6 STATEMENT

No Petitioner is a nongovernmental corporation.

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TABLE OF AUTHORITIES

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ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270 (1987) 23

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Kentucky Lottery Corp. v. Casey, 862 S.W.2d 888 (Ky. 1993) 16

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Charles Allan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 1987) 13

Eric Bruggink, *A Modest Proposal*, 28 Pub. Cont. L.J. 529 (1999) 19

H.R. Conf. Rep. 97-259 (1982) 3

John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* (3rd ed. 1998) 11

John E. Theuman, Annotation, *State Lotteries: Actions by Ticketholders Against State Contractor for State*, 40 A.L.R. 4th 662 (1985) 2

Restatement (Second) of Contracts (1979) 11, 27

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Gene A. Folden, Coastal Communications Associates, and Judith A. Longshore, request this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") that held that the United States Court of Federal Claims ("Court of Federal Claims") lacked subject matter jurisdiction to render a judgment on Petitioners' claims that the Federal Communications Commission ("FCC" or "Commission") breached implied-in-fact contracts to hold lotteries to select licensees to operate cellular systems in seven rural service areas ("RSAs").[1]

OPINIONS BELOW

The opinion of the Federal Circuit (App. 1a) is reported at 379 F.3d 1344. The order denying rehearing by the panel and rehearing *en banc* (App. 35a) is not reported. The opinion of the Court of Federal Claims (App. 37a) is reported at 56 Fed. Cl. 43.

JURISDICTION

The judgment of the Federal Circuit was entered on August 16, 2004. Petitioners' petition for rehearing was denied on November 18, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Tucker Act, 28 U.S.C. § 1491(a)(1) (App. 116a), § 402 of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. § 402

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[1]The seven RSAs are North Dakota 3 - Barnes, Minnesota 11 - Goodhue, Texas 21 - Chambers, Arkansas 9 - Polk, Florida 11 - Monroe, Puerto Rico 5 - Ceiba, and Pennsylvania 4 - Bradford. The RSAs will be referred to by state.

(App. 114a), and § 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (App. 113a).

STATEMENT

Suppose that after tickets were sold for a D.C. Lucky Lotto Game in 1988, the District of Columbia Lottery and Charitable Games Control Board, which ran the game, simply cancelled the drawing, never awarded the prize, and made no refunds to the ticket holders. In our hypothetical, the ticket holders would have a cause of action against the lottery board, because principles of contract law apply to lotteries operated by the District of Columbia.[2]

This case questioned whether principles of contract law also applied to the FCC, which was running the other agency-sponsored lottery that operated in the District of Columbia in 1988. The question remains unanswered, because the Federal Circuit decided that the Court of Federal Claims lacked Tucker Act jurisdiction to render a judgment on Petitioners' claims against the government for $144 million in damages for the FCC's breach of implied-in-fact contracts to conduct lotteries as it promised in 1988.

In 1981, disenchanted with comparative hearings as a means to award FCC licenses, Congress authorized the Commission to allocate licenses by a system of random selection or lottery. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, ch. 2, 1242, 95 Stat. 357, 736-37 (1981) (codified in 47 U.S.C. § 309(i)). By 1981, state-sponsored lotteries had become popular, and state courts uniformly held that the relationship between state-run lotteries and contestants is governed by contract law.[3] It was

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[2] *See Peterson v. D.C. Lottery and Charitable Games Control Bd.*, 673 A.2d 664, 666 (D.C. 1996) (contract principles governed rights of 1986 lottery winner).

[3] *See Coleman v. State*, 258 N.W.2d 84, 86 (Mich. Ct. App. 1977) (citing *Clark v. Washington*, 25 U.S. (12 Wheat) 40 (1827)); John E.

against this common-law backdrop that Congress authorized the FCC to jump on the lottery bandwagon.

When the FCC initially declined to adopt lottery rules, Congress enacted legislation in 1982 that mandated the Commission to put lottery rules in place within 180 days and directed the agency to adopt specific procedures. *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1087, 1094-95 (1982). Congress instructed the Commission to make a post-lottery determination of the qualifications of a lottery winner. *See* H.R. Conf. Rep. 97-259, at 39, *reprinted in*, 1982 U.S.C.C.A.N. 2268, 2283 (1982). If the winner was disqualified, Congress directed that the FCC "shall conduct another lottery, if necessary, and select another applicant." *Id.* at 39, *reprinted in*, 1982 U.S.C.C.A.N. at 2283. As an incentive for the losing applicants to question the qualifications of the lottery winners, Congress specified that when a winner is disqualified "the subsequent lottery must be conducted with the same applicant pool." *Id.*

The FCC complied with the congressional directives and conducted lotteries for the cellular licenses for all but the 30 largest of the 305 metropolitan statistical areas. In 1988, the FCC modified its lottery rules in preparation for holding lotteries for the cellular licenses in the 428 RSAs. When the RSA lottery process began, the FCC's cellular rules provided: "If a properly filed application for an initial license in the [cellular service] ... is mutually exclusive with another such application, the applicants shall be included in the random selection process." 47 C.F.R. § 22.33(a) (1988).

The FCC periodically issued "public notices" announcing when applications for a particular block of RSA licenses were to be filed. The notices set forth the "letter-perfect" pre-lottery procedures that governed the preparation

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Theuman, Annotation, *State Lotteries: Actions by Ticketholders Against State Contractor for State*, 40 A.L.R. 4th 662, 663 (1985).

and filing of the applications. *See Cellwave Telephone Services, L.P. v. FCC*, 30 F.3d 1533, 1534-35 (D.C. Cir. 1999) (describing FCC's "letter-perfect" standard).

Petitioners were among the applicants that prepared 4,276 letter-perfect applications for the seven RSA licenses. *See* App. 84a. The applications were filed with the FCC in 1988 at an estimated cost to the applicants of $4.3 million, including $855,200 in fees paid to the FCC. *See id.*[4]

The FCC subsequently issued "lottery notices" naming Petitioners among those whose applications for the seven licenses had been accepted for filing. Each lottery notice announced the date of the lottery and set forth the lottery procedures that would be followed. Every notice contained the promise that, if the application selected cannot be granted, "another lottery will be held for that market and another application will be selected from the remaining applications." *See id.*

Lotteries for the seven licenses were held throughout 1989. *See id.* Relying on the FCC's congressionally-mandated promise to hold a relottery, competing applicants participated in the FCC proceedings that led to the disqualification of the seven lottery winners. *See id.* 86a. Competing applicants also intervened in support of the FCC in the appeals that followed. In one proceeding, competitors spent over $2 million contesting the qualifications of the initial lottery winners. *See id.* 88a.

The RSA relottery process began in 1990. *See* App. 88a. The FCC's relottery notices contained the familiar promise that yet another lottery would be held if the applications selected at the "new lotteries" could not be granted. *See id.* 88a-89a. The relottery process was codified by the FCC in

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[4]The FCC estimated it cost $800 to prepare an application for a cellular lottery. *See FCC Report to Congress on Spectrum Auctions*, FCC 97-353, 1887 WL 629251, at *9 (Oct. 9, 1997). The FCC required a $200 per-application filing fee.

1991. *See* 47 C.F.R. § 1.823(b)(3); *Amendment of the Commission's Rules for Rural Cellular Service*, 6 F.C.C.R. 6185, 6219 (1991). One of the seven RSA licenses, the Texas license, was included in a relottery held in 1992, but the relottery winner was disqualified in 1994. *See* App. 89a.

In July 1993, Congress authorized the FCC to sell its licenses to the highest bidder at auctions. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. VI, § 6002(a), 107 Stat. 312, 387-92 (1993) (codified at 47 U.S.C. § 309(j)). The statute required the FCC to use auctions for applications filed after July 26, 1993, but left the FCC with discretion to continue to use lotteries for applications filed before that date. *See id.* § 6002(e)(2), 107 Stat. at 397. In July 1994, the FCC exercised its discretion with respect to cellular applications for unserved areas that had been filed before July 26, 1993. *See Implementation of § 309(j) of the Communications Act – Competitive Bidding*, 9 F.C.C.R. 7387, 7390-93 (1974).

In 1996, the FCC's cellular rules provided that applications for the initial license for an RSA would be processed under the rules in effect when the applications were filed unless the Commission determined otherwise in a particular case. *See* 47 C.F.R. § 22.959 (1996). The FCC made no such determination with respect to six of the long-pending applications for the seven RSA licenses. The FCC issued a public notice in July 1996 announcing that a relottery for the Arkansas, Florida, Minnesota, North Dakota, Pennsylvania, and Puerto Rico licenses would be held on September 18, 1996. *See* App. 91a.

In August 1996, former FCC officials representing the interim cellular operator in Puerto Rico began lobbying the agency to cancel the scheduled relottery and to auction the Puerto Rico license. *See id.* 91a-92a. After agency officials entertained oral and written *ex parte* presentations urging them not to hold the relottery, the FCC's Wireless Telecommunications Bureau ("WTB"), issued a public notice on September 10, 1996 announcing that the

September 18, 1996 relottery had been "postponed." No reason was given for the "postponement." *See* App. 92a.

The WTB issued a second public notice on October 24, 1996, soliciting public comments on a petition, filed *ex parte* the day before the relottery was postponed, that requested a declaratory ruling that the Puerto Rico license would be sold at auction. *See id.* The WTB noted, without explanation, that the September 18, 1996 relottery had been postponed. *See Cellular Communications of Puerto Rico, Inc.*, 11 F.C.C.R. 13847, 13874 (WTB 1996).

In April 1997, a group of applicants petitioned the D.C. Circuit for a writ of mandamus directing the FCC to conduct the postponed relotteries. *See* App. 93a. In June 1997, having been led to expect FCC action "in the near future," the D.C. Circuit denied the petition without prejudice to refiling after 180 days if the FCC failed to take action on the matter. *See id.*; *In re Coalition for Equity in Licensing*, No. 97-1272, 1997 WL 404724, *1 (D.C. Cir. June 27, 1997) (per curiam). Before 180 days passed, however, Congress repealed the FCC's lottery authority. *See* Balanced Budget Act of 1997, Pub. L. 105-33, § 3002(a)(4), 111 Stat. 251 (1997) ("1997 Budget Act"). The repeal came in August 1997, nearly a year after the FCC decided to stop holding relotteries. *See* App. 93a.

The applications for the seven RSA licenses languished before the FCC until April 1999, when they were finally dismissed without prejudice by the WTB. *See, e.g., Certain Cellular RSA Applications*, 14 F.C.C.R. 4619, 4620-21 (WTB 1999), *reconsid. denied*, 16 F.C.C.R. 4860 (WTB 2001), *application for review denied*, 17 F.C.C.R. 8508 (2002), *aff'd, Ranger Cellular v. FCC*, 348 F.3d 1044 (D.C. Cir. 2003). The WTB stated that the applications could not be processed under the rules in effect when they were filed because the FCC's lottery authority had been repealed by the 1997 Budget Act. *See id.*, 14 F.C.C.R. at 4620. The WTB claimed to have made the decision to dismiss the applications under its own delegated authority, because its decision was "unambiguously compelled by statute." *Id.* IT

The WTB did not disclose that the FCC's decision not to hold relotteries had been made in September 1996. It did announce that the FCC would not refund the $853,600 in fees it collected for awarding the seven licenses by lottery. *See Certain Cellular RSA Applications*, 14 F.C.C.R. at 4621.

Lobbying efforts on behalf of the disqualified initial lottery winners for the Minnesota, Florida, and Pennsylvania licenses succeeded in December 2000, when Congress passed legislation directing the FCC to award the three licenses to the original winners for a special "fee." *See* Launching Our Communities' Access to Local Television Act, Pub. L. No. 106-533, Title X, § 1007, 114 Stat. 276A-128, 276A-138 (2000). The FCC complied by awarding three RSA licenses valued at $102.6 million to the once-disqualified selectees for $1.2 million. *See* App. 95a-96a; *WTB Grants Rural Cellular Licenses*, 16 F.C.C.R. 5601 (WTB 2001).

In February 2001, the Commission finally proposed rules under which the Arkansas, North Dakota, Texas and Puerto Rico licenses would be put up for bid. *See* App. 95a; *Implementation of Competitive Bidding Rules to License Certain RSAs*, 16 F.C.C.R. 4296 (2001).

In March 2001, two years after dismissing the applications for the seven RSA licenses, the WTB refused to reconsider the matter. *See* App. 95a. It held that the applications had been properly dismissed for the reasons it stated in 1999. *See Certain Cellular RSA Applications*, 16 F.C.C.R. at 4861. Moreover, the WTB claimed that the applicants had no right to have a relottery "conducted without regard to any substantive rule changes." *Id.* at 4862-63. Again, the WTB did not reveal that the Commission deprived the applicants of their right to have a relottery prior to any statutory or rule change.

Several parties asked the Commission to review the WTB's decision. High Tower Communications, Inc. ("High Tower") argued that FCC-sponsored lotteries were governed by contract law just as were state-sponsored lotteries. *See*

Certain Cellular RSA Applications, 17 F.C.C.R. at 8514-17. Recognizing that the relief it sought was available only from the Court of Federal Claims, High Tower argued that the applicants for the seven RSA licenses were entitled to money damages for the FCC's breach of its implied contracts to award those licenses by lottery. *See* App. 96a.

Petitioners faced a bleak regulatory landscape in September 2001. The FCC had been without authority to conduct relotteries for four years. Three of the RSA licenses had been sold in March 2001 at the direction of Congress. No final FCC action had been taken either with respect to the rules under which the remaining RSA licenses would be auctioned, or on the appeals from the WTB's dismissal of the RSA applications. Petitioners could have waited until the FCC issued final, appealable orders and sought judicial review.[5] However, Petitioners correctly anticipated that the FCC would time the release of its final orders so that the remaining licenses would be auctioned before they could get to court.[6] Concluding that judicial review could not provide

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[5]The exhaustion of remedies doctrine codified in the Communications Act only requires that the FCC be afforded an "opportunity to pass" on an issue as a prerequisite to judicial review. 47 U.S.C. § 405(a). Moreover, the party seeking judicial review of an issue need not be the party that gave the FCC the opportunity to pass on that issue. *See, e.g., Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997). Petitioners' implied-in-fact contract claims were presented to the FCC by High Tower. *See Certain Cellular RSA Applications*, 17 F.C.C.R. at 8514-17. Since the FCC had an opportunity to pass on the claims, Petitioners could have made the same arguments to an appeals court.

[6]The FCC issued its final order in its rulemaking on January 28, 2002. *See Implementation of Competitive Bidding Rules to License Certain RSAs*, 17 F.C.C.R. 1960 (2002). Its final order upholding the WTB was released on May 9, 2002. *See Certain Cellular RSA Applications*, 17 F.C.C.R. at 8508. The auction of the Arkansas, North Dakota, and Puerto Rico licenses began on May 22, 2002 and closed on June 4, 2002. The three licenses were sold before the expiration of the 30-day period for filing a notice of appeal. *See* 47 U.S.C. § 402(c).

them with an adequate remedy, Petitioners sued the government for damages in the Court of Federal Claims under the Tucker Act, alleging that the FCC breached implied-in-fact contracts to award the RSA licenses in accordance with its lottery rules and procedures. *See* App. 78a-79a. They sued on behalf of the class of applicants who were denied what the FCC promised: chances to be awarded licenses worth $144 million. *See id.* 80a.

The common law of lotteries framed Petitioners' complaint. Under common law, advertising a lottery to the public is in the nature of an offer whose acceptance is conditioned on performance according to the promoter's rules and procedures.[7] By performing the act requested by the promoter, an entrant accepts the offer, agrees to the rules and procedures of the lottery, and forms a binding contract with the promoter.[8] Consideration is provided by entering the lottery and complying with the terms of the offer.[9] The rights and obligations of the contracting parties are limited by the terms of the promoter's offer, that is, by the rules and procedures of the lottery as made public.[10]

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[7]*See Kinnard v. Circle K Stores Inc.*, 966 S.W.2d 613, 616 (Tex. App. 1998); *Jones v. Capitol Broadcasting Co.*, 495 S.E.2d 172, 174 (N.C. 1998); *Haynes v. Dep't of the Lottery*, 630 So.2d 1177, 1179 (Fla. Dist. Ct. App. 1994); *Thao v. Control Data Corp.*, 790 P.2d 1239, 1241 (Wash. Ct. App. 1990); *Coleman*, 258 N.W.2d at 86.

[8]*See Georgia Lottery Corp. v. Sumner*, 529 S.E.2d 925, 928 (Ga. Ct. App. 2000); *Brown v. State*, 602 N.W.2d 79, 89-90 (Wis. Ct. App. 1999); *Stewart v. Texas Lottery Comm'n*, 975 S.W.2d 732, 736 (Tex. Ct. App. 1998); *Kinnard*, 966 S.W.2d at 616; *Haynes*, 630 So.2d at 1179; *Driscoll v. State*, 627 A.2d 1167, 1171 (N.J. Super. Ct. 1993); *Peters v. Ohio State Lottery Comm'n*, 587 N.E.2d 290, 292 (Ohio 1992); *Thao*, 790 P.2d at 1241; *Coleman*, 258 N.W.2d at 86.

[9]*See Jones*, 495 S.E. 2d at 174.

[10]*See Kinnard*, 966 S.W.2d at 616; *Driscoll*, 627 A.2d at 1171.

Petitioners' seven breach-of-contract counts mirrored the common law. They alleged the FCC made a public offer that applicants would have chances of winning RSA licenses in lotteries. *See, e.g.*, App. 97a. Acceptance of that offer was conditioned on the applicants properly filing letter-perfect applications and paying $200 in fees to the FCC in accordance with its lottery rules and publicly announced procedures. *See id.* By filing applications and paying the fees as the FCC required in 1988, Petitioners accepted the FCC's offer, agreed to the FCC's lottery rules and procedures, and formed binding contracts with the agency. *See id.* Petitioners provided consideration by entering the lotteries and complying with the FCC's lottery rules and procedures. *See* App. 98a.

Petitioners alleged that the terms of the contracts between the FCC and plaintiffs were set out in the FCC's lottery rules and the procedures announced to the public in its lottery notices. *See id.* 98a. One of the terms was that, if the application selected could not be granted, a relottery would be held. *See id.* The public announcement that relotteries would be held contractually bound the FCC, as the lottery promoter, to hold relotteries as promised. *See id.*

The facts alleged by Petitioners complete the "normal offer-acceptance-consideration equation for the formation of enforceable contracts." *Lucas v. United States*, 25 Cl. Ct. 298, 304 (1992) (quoting *National Bowlers, Inc. v. Tassos*, 715 F. Supp. 323, 325 (D. Kan, 1989). Because a failure to perform a contractual duty when it is due is a breach, *e.g.*, *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000), Petitioners claimed that the FCC first breached its implied-in-fact contracts when it decided that it would not hold the relottery scheduled for September 18, 1996. *See, e.g.*, App. 98a.

The Court of Federal Claims dismissed Petitioners' complaint *both* for failure to state a claim upon which relief could be granted and for want of subject matter jurisdiction.

See App. 77a. Despite the *Accardi* doctrine,[11] the trial court found that no "contractual promise" could be gleaned from the FCC's lottery rules and publicly announced procedures. App. 58a. The court inferred that the FCC could not have intended to be contractually bound to its lottery and relottery procedures in 1988.[12] It drew that inference from a 1995 change in the FCC's rules and a series of decisions of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") that were issued years after the agency allegedly manifested its intent to be bound. *See* App. 58a-62a. Reaching the merits, the court held that Petitioners failed to establish the mutuality of intent element of an implied-in-fact contract and, therefore, failed to establish the existence of such contracts with the FCC. *See id.* 62a.

The trial court's decision on the merits was reduced to dictum when it dismissed Petitioners' complaint for lack of subject matter jurisdiction. *See id.* 77a. Believing the complaint was "logically" based on the FCC's decision to

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[11]The *Accardi* doctrine holds that agencies are bound to follow their own rules. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267-28 (1954); *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32, 34 n.3 (D.D.C. 1998). In 1988, the FCC was no stranger to the doctrine and the "long line of cases" holding that it must abide by its own rules. *Reuters LTD v. FCC*, 781 F.2d 946, 947 (D.C. Cir. 1986). The Court of Federal Claims also followed the doctrine by holding that an "agency is bound by the express terms of its regulations until it amends or revokes them." *Nolan v. United States*, 44 Fed. Cl. 49, 57 (1999).

[12] *See* App. 61a. Petitioners rely on the principle that an enforceable contract is formed "when one party manifests an intent to be bound to a set of terms and conditions and the other party timely agrees to that relationship." John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 203 (3rd ed. 1998). Their theory is that: (1) the FCC's lottery rules and public notices were binding on the agency and their release to the public in 1988 manifested the agency's intent to be bound; and (2) applicants were justified in understanding that a commitment had been made by the FCC upon which they could rely. *See Restatement (Second) of Contracts* § 2(1) (1979) ("*Restatement*").

dismiss Petitioners' applications, the court jumped to the conclusion that Petitioners' claims should be reviewed by the D.C. Circuit under § 402(b)(1) of the Communications Act. *See* App. 54a. The court dismissed Petitioners' complaint specifically because it lacked jurisdiction "to review FCC licensing decisions." *Id.* 77a. However, it also invoked a "frivolousness" exception to Tucker Act jurisdiction and it did so in vituperative terms. *See id.* 71a-72a.

The Federal Circuit did not find that Petitioners' claims were jurisdictionally frivolous, but it agreed that their claims are covered by § 402(b)(1) and subject to the exclusive jurisdiction of the D.C. Circuit. *See id.* 2a. The court saw the "true nature" of Petitioners' implied contract claims to be a challenge to the FCC's failure to hold relotteries. *See id.* 27a n.13. Therefore, it treated Petitioners' suit for $144 million in damages from the government as a suit for "judicial review" of the FCC's decision in September 1996 not to hold relotteries. *Id.* 34a.

The Federal Circuit found that the FCC's decision not to hold relotteries was "announced" by the public notice *postponing* the relotteries that the WTB issued on September 10, 1996. *Id.* 29a n.14. The court concluded that the "cancellation" of the relotteries denied Petitioners the "ability to receive the licenses by lottery." *Id.* It found that the FCC "in fact" denied Petitioners' lottery applications "albeit without issuing a formal order." *Id.* 32a. Hence, the FCC's decision in September 1996 not to hold relotteries became an "appealable decision" within the meaning of § 402(b). App. 29a n.14.

The court classified the FCC's September 1996 decision as an action "ancillary to the denial of an application for a station license" as set forth in § 402(b)(1). *Id.* 33a-34a. That classification placed Petitioners in the "wrong court" because they were seeking judicial review of an FCC decision that is subject to the exclusive appellate jurisdiction of the D.C. Circuit. *See id.* 22a n.9, 34a. By that roundabout route, the Federal Circuit arrived at its decision that the exclusive appellate jurisdiction of the D.C. Circuit under §

402(b)(1) "preempts" the exclusive original jurisdiction of the Court of Federal Claims under the Tucker Act. *See* App. 27a n.13.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD OVERRULE THE CASES THAT PERMIT COURTS TO DISMISS CLAIMS FOR LACK OF SUBJECT-MATTER JURISDICTION AFTER MAKING A DECISION ON THEIR MERITS

A. The Trial Court Failed To Decide The Antecedent Question Of Its Tucker Act Jurisdiction

Subject-matter jurisdiction refers to "the court's statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). (emphasis in original). If it lacks subject-matter jurisdiction, a federal court must dismiss the case. *See id.* at 94-95. It cannot assume jurisdiction for the purpose of reaching and deciding the merits of a case. *See id.* at 101-102.

Petitioners alleged that the Court of Federal Claims had subject-matter jurisdiction under the Tucker Act. *See* App. 79a. The Tucker Act gives the Court of Federal Claims the power or "jurisdiction to render judgment upon any claim against the United States founded ... upon any express or implied contract with the United States." 28 U.S.C. §1491(a)(1); App. 116a. That court's Tucker Act jurisdiction is determined by the nature of the plaintiff's claim against the United States. *See* 17 Charles Allan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4101 (2d ed. 1987). To be cognizable under the Tucker Act, the claim against the United States "must be one for money damages." *United States v. Mitchell*, 463 U.S. 206, 216 (1983). If a plaintiff makes a claim for money damages against the United States that is founded upon an implied contract, the Court of Federal Claims has jurisdiction. *Id.* at 212. Moreover, if the plaintiff's claim is for money damages exceeding $10,000, the Court of Federal Claim has exclusive jurisdiction, "unless Congress has withdrawn the Tucker Act

grant of jurisdiction in the relevant statute." *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998).

The trial court had the threshold obligation to decide the antecedent question of whether it had jurisdiction under the Tucker Act to render judgment on Petitioners' claims against the government. *See Steel*, 523 U.S. at 94-95.[13] If so, the court's Tucker Act jurisdiction would be exclusive since petitioners' claims for damages far exceed $10,000. Once jurisdiction was conferred upon it, the trial court could not abstain from exercising its jurisdiction.

This Court has "often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1966). Federal courts may decline to exercise jurisdiction under this Court's abstention doctrines, but no abstention principle can be applied in a common-law suit for damages for breach of contract. *See id.* at 730-31. The duty of the Court of Federal Claims to render a judgment on a common-law claim for damages based on a contract is expressed by Congress in the mandatory terms of the Tucker Act. *See* 28 U.S.C. § 1491(a)(1); App. 116a (the court "shall have jurisdiction to render judgment"). In light of the importance Congress has ascribed to the exclusive nature of Tucker Act jurisdiction, *see Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1332-33 (Fed. Cir. 2004), the Court of Federal Claims had an absolute duty to

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[13] The trial court had Article III jurisdiction to hear Petitioners' claims. In reliance on that the FCC's offer in 1988 to award seven RSA licenses by lottery, Petitioners incurred the expense of preparing and filing letter-perfect applications as required by the FCC. *See supra* pp. 9-10. They allege they suffered injury when they were denied the chance to be awarded the valuable licenses. *See, e.g.*, App. 97a-98a. That injury is traceable to the FCC's decision in September 1996 that it would not hold relotteries in accordance with its lottery procedures. *See id.* Petitioners' injuries were redressable by the trial court under the Tucker Act by an award of money damages in an amount equal to the fair market value of the seven RSA licenses. *See id.* 110a-111a.

render judgment on Petitioners' common-law claims for damages if they invoked the court's exclusive jurisdiction under the Tucker Act. *See Quackenbush*, 517 U.S. at 716 (duty to exercise jurisdiction is absolute unless abstention principle applies).

Petitioners' amended complaint makes a "claim against the United States" for $144 million in damages. *See* App. 110a-111a. The complaint lists seven counts, each founded upon an allegation that an implied-in-fact contract exists with an agency of the federal government. *See id.* 97a-110a. Each count plainly states a claim against the federal government for breach of contract, *see id.*, and a claim based on a contract with the United States is "the sine qua non of jurisdiction in the Court of Federal Claims." *Katz v. Cisneros*, 16 F.3d 1204, 1210 (Fed. Cir. 1994).

Petitioners' prayer for relief calls on the Court of Federal Claims to "adjudge the alleged conduct of the FCC to be in breach of its implied-in-fact contracts with the plaintiffs to award [licenses] by lottery." App. 110a. On each count, Petitioners seek an award of damages based on the fair market value of the license the FCC promised to award by lottery. *See id.* 110a-111a. If they prevail on their complaint, plaintiffs will "be receiving monetary damages from the public fisc of the United States which is the touchstone of Tucker Act jurisdiction." *Brazos Electric Power Co-Op., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998).

Petitioners' complaint raises a federal question by making claims for money damages that are among the types of claims against the United States specified in the Tucker Act. *See Mitchell*, 463 U.S. at 212. That was generally sufficient to confer power on the Court of Federal Claims to decide whether or not Petitioners' claims have merit. *See Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951). However, when Petitioners filed suit, the Federal Circuit was reluctantly following the line of this Court's cases that countenance the dismissal of frivolous claims on jurisdictional grounds. *See Lewis v. United States*, 70 F.3d 597, 603-604 (Fed. Cir. 1995). Under

the Federal Circuit's standard, the Court of Federal Claim has Tucker Act jurisdiction if the complaint presents "a non-frivolous allegation of the existence of an implied-in-fact contract."[14] The Court of Federal Claims is to dismiss a frivolous implied contract claim on jurisdictional grounds only if it is "starkly frivolous." *Lewis*, 70 F.3d at 604.

Petitioners' complaint met the Federal Circuit standard by alleging specific facts and circumstances which, if taken as true and fairly construed, support the inference that implied lottery contracts were in fact formed in 1988. *See, e.g.*, App. 97a-98a. Petitioners' implied contract claims are based on the common-law rule that principles of contract law apply to government-sponsored lotteries.[15] That rule emanates from *Clark v. Washington*, in which this Court recognized a contract between the operator of a congressionally-authorized lottery and a ticket holder. *See* 25 U.S. (12 Wheat) at 59. Petitioners took their contract theory from the courts in nineteen states and the District of Columbia that have applied contract law to agency-run lotteries.[16] Every court that has considered the question has

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[14]*Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000). *See City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998); *Total Medical Management, Inc. v. United* States, 104 F.3d 1314, 1319 (Fed. Cir. 1997); *Trauma Service Group v. United States,* 104 F.3d 1321, 1325 (Fed. Cir. 1997).

[15]*See Shankland v. Washington*, 25 U.S. (5 Pet.) 390, 394 (1831); *Walters v. National Beverages, Inc.*, 422 P.2d 524, 525 (Utah 1967).

[16]*See Moody v. State Liquor & Lottery Commission*, 843 A.2d 43, 48 (Me. 2004); *Smith v. State Lottery Commission of Indiana*, 812 N.E.2d 1066, 1072 (Ind. Ct. App. 2004); *Georgia Lottery*, 529 S.E.2d at 928; *Brown*, 602 N.W.2d at 89-90; *Houghton v. Big Red Keno, Inc.*, 574 N.W.2d 494, 497-98 (Neb. 1998); *Kinnard*, 966 S.W.2d at 616; *Peterson*, 673 A.2d at 666; *Haynes*, 630 So.2d at 1179; *Driscoll*, 627 A.2d at 1171; *Kentucky Lottery Corp. v. Casey*, 862 S.W.2d 888, 890 (Ky. 1993); *Parsons v. South Dakota Lottery Comm'n*, 504 N.W.2d 593, 597 (S.D. 1993); *Peters*, 587 N.E.2d at 292; *Raylene Hair v. State*, 2 Cal. Rptr. 2d 871, 874 (Cal. Ct. App. 1991); *Fujishima v. Games Management*

held that the rules and regulations of the lottery "become part of the contract between the parties." *Moody*, 843 A.2d at 48.

Petitioners' legal argument is simply that the common law of contracts applies to federal government-run lotteries as it applies to state government-run lotteries. It requires a very short extension of existing law to apply common-law contract principles to the FCC's lotteries. The Court of Federal Claims has held that federal agencies fall subject to the same common-law rules that apply to the formation of contracts generally. *See, e.g., Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 289 (1995) (offer is accepted by a federal government auctioneer upon the "fall of the hammer"). Recognizing the FCC's dual role in the licensing process, as "offeror in the auction and regulator thereafter," the Second Circuit applied contract law principles to the FCC's spectrum auctions. *See In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 60-62 (2nd Cir. 1999).[17] Petitioners argued that when Congress chose a licensing scheme that placed the FCC in the role of an "offeror" in a lottery, the agency fell subject to the "usual rules" that govern a lottery. *Cf., NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130, 133 (D.C. Cir. 2001), *aff'd, FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2002).

Services, 110 Misc.2d 970, 976 (N.Y. Sup. Ct. 1981); *Thao*, 790 P.2d at 1241; *Valente v. Rhode Island Lottery Comm'n*, 544 A.2d 586, 589 (R.I. 1988); *Ruggiero v. State Lottery Comm'n*, 489 N.E.2d 1022, 1024 (Mass. App. Ct. 1986); *Van Gulik v. Resource Dev. Council for Alaska, Inc.*, 695 P.2d 1071, 1073 (Alaska 1985); *Estlow v. New Hampshire Sweepstakes Comm'n*, 449 A.2d 1212, 1213 (N.H. 1982); *Coleman*, 258 N.W.2d at 86.

[17]The Second Circuit did not reach the question of whether federal common law governed FCC auctions, *see NextWave*, 200 F.3d at 57 n.14, and it declined to create a "federal common law of auctions." *Id.* at 60. Nevertheless, the court unmistakably found that a contract had been formed that was binding on the FCC. *See id.* at 62.

"Assuming, for the sake of argument," that it had jurisdiction, and because "certain case precedent suggests that almost any implied-in-fact allegation" gives it jurisdiction, the trial court proceeded to render a judgment on Petitioners' implied contract claims and to dismiss their complaint for failure to state a claim upon which relief can be granted. App. 54a, 77a. That was a decision on the merits. *See, e.g., Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995).

B. The Trial Court Exercised Hypothetical Jurisdiction To Draw Unwarranted Inferences Adverse To Petitioners

The trial court applied the "doctrine of hypothetical jurisdiction" that this Court declined to endorse in *Steel*. *See* 523 U.S. at 94. The court "assumed" jurisdiction to: (1) address the merits of Petitioners' implied-in-fact contract claims at some length, *see* App. 52a-62a; (2) find that Petitioners failed to establish that implied contracts were formed, *see id.* 62a; and (3) render a judgment on the merits of the implied contract claims by dismissing them for failure to state a claim. *See id.* 77a. Having done so, the court took a second look at Petitioners' claims and appeared to conclude that Petitioners were seeking judicial review of FCC licensing orders. *See id.* 62a-72a. Because it was without authority "to review FCC decisions," the court dismissed Petitioners' complaint a second time for want of subject matter jurisdiction. *See id.* 77a.

Not content with dismissing Petitioners' complaint twice on mutually exclusive grounds, *see Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988), the court returned to the merits a third time and found them to be so insubstantial as to warrant their dismissal on the ground of jurisdictional "frivolousness." App. 71a-72a. The court's treatment of Petitioners exemplifies the practice of exercising hypothetical jurisdiction at its very worst.

The trial court was obliged to decide if it had Tucker Act jurisdiction antecedent to addressing the merits. *See Steel*,

523 U.S. at 101. If it was without jurisdiction, the trial court's authority was limited to dismissing Petitioners' complaint. *See id.* at 94-95. Disregarding the limits of its jurisdiction under *Steel*, the trial court explicitly assumed jurisdiction for the purpose of deciding the merits of Petitioners' claims. By exercising hypothetical jurisdiction, the trial court produced a "hypothetical judgment" that Petitioners' failed to state a claim. *Id.* at 101. For it to pronounce upon the merits of Petitioners' claims after deciding it had no jurisdiction was, by very definition, to act ultra vires. *See id.* at 101-102. For it to pronounce that Petitioners' claims were jurisdictionally "frivolous," when it claimed to be without jurisdiction, was to gratuitously act ultra vires.

The trial court did not address, distinguish or even acknowledge the authorities upon which Petitioners based their contract theory. To avoid giving any "credence" to that theory, the court claimed erroneously that Petitioners could "offer [it] no precedent to support their novel attempt to imply a contract under the facts presented." App. 71a. Notably, the court's opinion did not include a citation to any decision of this Court, or any other court, that would preclude Petitioners' argument. *See id.* 52a-72a. Without such precedent, the trial court's finding of jurisdictional frivolousness was baseless, as well as ulta vires.[18]

The trial court recognized that it was acting on a motion to dismiss for lack of jurisdiction and that it "must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in [Petitioners'] favor." App. 48a. However, the court disregarded the text of Petitioners' complaint and drew unwarranted inferences adverse to Petitioners from facts that were either not in the pleadings, erroneous, or based on its inexpert view of FCC

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[18] The best that can be said of the trial court's advisory opinion of Petitioners' argument is that it confirms the assessment of one judge that the Court of Federal Claims "has little natural affinity for novelty." Eric Bruggink, *A Modest Proposal*, 28 Pub. Cont. L.J. 529, 530 (1999).

practices and procedures.[19] For the court to exercise hypothetical jurisdiction to find that Petitioners "conjured" their contract theory, while ignoring the substantial weight of the precedent supporting their theory, was highly prejudicial. App. 71a. Most disturbing was the court's assumption of jurisdiction for the purpose of assailing Petitioners' motives and assuming their factual allegations are untrue. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (Rule 12(b)(6) does not countenance a dismissal "based on a judge's disbelief of a complainant's factual allegations").

It is inconsistent with the Court's view of subject matter jurisdiction as "an antecedent question" to allow a claim to be dismissed for lack of jurisdiction if it is deemed either "immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Steel*, 523 U.S. at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). A court must reach and address the merits of a claim before deciding that it is "immaterial" or, as in this case, "frivolous." As this case also shows, courts devote lengthy opinions to the merits of claims that are allegedly so immaterial or frivolous that the courts are without jurisdiction to hear them. It would serve the interests of judicial economy, and maintain the "purity" of the rule that jurisdiction be established as a threshold matter, if the Court would overrule the cases that allow for dismissals for jurisdictional "frivolousness." If claims are "immaterial" or "wholly insubstantial and frivolous," they should be dismissed on their merits for failure to state a claim.

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[19]The trial court charged that Petitioners: (1) "ignored" the prescribed channels within the FCC and before the D.C. Circuit for seeking redress of the dismissal of their applications; (2) used the "pretext" of contract review to seek redress from applicable statutes and regulations; (3) attempted to "circumvent" court procedures, which should be given no "credence" since "no contract was ever contemplated;" and (4) used "valuable court time by renaming their claim" to seek redress in the Court of Federal Claims, or "because they failed to pursue their administrative remedies." App. 71a.

II. THE FEDERAL CIRCUIT'S DECISION THAT THE APPELLATE JURISDICTION OF THE D.C. CIRCUIT PREEMPTS THE TUCKER ACT JURISDICTION OF THE COURT OF FEDERAL CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT AND THE D.C. CIRCUIT'S RULE ON TUCKER ACT JURISDICTION

The Federal Circuit failed to discharge its threshold obligations to first satisfy itself of its own jurisdiction and then to decide the question of whether the Court of Federal Claims had jurisdiction over Petitioners' claims. *See Steel*, 523 U.S. at 94-95. The court found that it had jurisdiction. App. 16a. It "explained" Petitioners' theory of Tucker Act jurisdiction, but it never decided whether the allegations stated in their complaint, if taken as true, established the existence of implied-in-fact contracts with the FCC. *See id.* 17a-19a. Instead, it turned to the question of whether the D.C. Circuit had exclusive jurisdiction over Petitioners' claims. *See id.* 19a. It neglected to return to the question Petitioners presented on appeal and the one it was "bound to ask and answer for itself." *Steel*, 523 U.S. at 94 (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). The court decided whether the D.C. Circuit had exclusive appellate jurisdiction when it was obliged first to decide whether the Court of Federal Claims had exclusive original jurisdiction.

The Federal Circuit did not disclose what caused it to depart from the text of Petitioners' complaint in search of the "true nature" of their claims. App. 27a n.13. Nor did it reveal the standard under which it divines the true nature of claims. The court effectively decided jurisdiction, and doomed Petitioners' case, with one sentence in the margin of its opinion. It stated, "At root, plaintiffs' action plainly represents a challenge to the Commission's failure to hold relotteries for the seven RSA licenses at issue." *Id.* With that one conclusory statement, Petitioners' complaint was recast as one for judicial review of the FCC's "decision" not to hold relotteries. *Id.* 29a n.14.

The Federal Circuit regards jurisdiction as a question of law. *See Vereda, LTDA v. United States*, 271 F.3d 1367, 1374 (Fed. Cir. 2001). Therefore, the court should have applied the law below. Instead, it decided the question of the trial court's jurisdiction by a judicial pronouncement unaccompanied by findings and an articulated legal standard. If there was a need to determine the true nature of petitioners' claim, the court could have adopted the test developed by the D.C. Circuit to determine whether claims are essentially contractual, and thus subject to the Tucker Act. Under that test, the "classification of a particular action as one which is or is not 'at its essence' a contract action depends both on the source of the rights on which the plaintiff bases its claims, and upon the type of relief sought (or appropriate)." *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982). The *Megapulse* "rights and remedies" test has been adopted by the Second, Fourth, Sixth and Ninth Circuits,[20] and it was applied by the Court of Federal Claims in *Norby Lumber Co., Inc. v. United States*, 46 Fed. Cl. 47, 51 (2000). Examined under the *Megapulse* test, Petitioners' claims come up contractual.

Petitioners are asserting their rights to have chances to win valuable cellular licenses in FCC relotteries. *See, e.g.*, App. 97a. Those rights are derived entirely from the terms of the implied-in-fact contracts they allege were formed in 1988. *See id.* The sole relief Petitioners seek is a cumulative award of damages in the amount of $144 million for the FCC's breach of contract. *See id.* 97a-98a. An award of damages is the appropriate type of relief and the remedy that is presumptively available upon the government's breach of contract. *See Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001). Petitioners are unmistakably pursuing damages for the government's "past acts," which is "the essence of a Tucker Act claim for monetary relief." *United*

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[20] *See UP State Federal Credit Union v. Walker*, 198 F.3d 372, 375 (2nd Cir. 1999); *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1136 (6th Cir. 1996); *United States v. J&E Salvage Co.*, 55 F.3d 985, 988 (4th Cir. 1995); *North Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994).

States v. Mottaz, 476 U.S. 834, 851 (1986). Petitioners' claims are, at the very least, essentially contractual under the D.C. Circuit's *Megapulse* "rights and remedies" test.

The Federal Circuit came to the remarkable conclusion that the exclusive appellate jurisdiction of the D.C. Circuit under § 402(b) of the Communications Act preempts the exclusive original jurisdiction of the Court of Federal Claims under the Tucker Act. App. 27a n.13. For § 402(b) to preempt the Tucker Act, the two statutes must overlap in the sense that they provide jurisdiction over the same types of claims. To determine if § 402(b) and the Tucker Act can reach the same claims, it is appropriate to use the definition of the term "claims" that was adopted for the purposes of jurisdiction by the Federal Circuit *en banc* in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (1999). Under that definition, a "claim pending in another court must arise from **the same operative facts**, and must seek **the same relief**" to preclude the Court of Federal Claims from hearing a claim under 28 U.S.C. § 1500. *Loveladies*, 27 F.3d at 1551 (emphasis in original). When the definition is used to test whether two statutes can reach the same claim, the operative facts will be the same. The issue becomes whether the "same relief" is available from the D.C. Circuit under § 402(b) and from the Court of Federal Claims under the Tucker Act.

Section 402(b) confers appellate jurisdiction on the D.C. Circuit to review "decisions and orders" of the FCC in nine types of cases. *See* 47 U.S.C. § 402(b)(1)-(9); App. 115a-116a. Although § 402(b) sets out the types of FCC decisions and orders that may be appealed to the D.C. Circuit, it is the APA that "codifies the nature and attributes of judicial review" by that court. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987). Indeed, § 402 explicitly codifies the judicial review provisions of the APA by mandating that the D.C. Circuit "shall hear and determine the appeal upon the record before it in the manner prescribed" by § 706 of the APA. 47 U.S.C. § 402(g); App. 116a.

The scope of judicial review under APA § 706 limits the D.C. Circuit to providing two forms of relief. It can (1)

compel an FCC "action unlawfully withheld or unreasonably delayed," and (2) "hold unlawful and set aside" a final FCC order. 5 U.S.C. § 706; App. 113a.[21] Therefore, the D.C. Circuit lacks jurisdiction to award monetary relief under § 706. Moreover, the waiver of sovereign immunity under the APA is for relief "other than money damages." 5 U.S.C. § 702; App. 113a. Thus, the APA explicitly excludes claims for money damages. *See A & S Council Oil Co., Inc. v. Lader*, 56 F.3d 234, 238 (D.C. Cir. 1995).

Because its jurisdiction under § 402(b) is prescribed by the metes and bounds of § 706 and the APA's waiver of immunity,[22] the D.C. Circuit is without jurisdiction to entertain a claim under § 402(b)(1) which explicitly seeks money damages from the federal government. And the D.C. Circuit employs a bright-line rule that a "claim is subject to the Tucker Act and its jurisdictional consequences if, in whole or in part, it explicitly or 'in essence' seeks more than $10,000 in monetary relief from the federal government." *Kidwell v. Dep't of the Army Bd. for Correction of Military Records*, 56 F.3d 279, 284 (D.C. Cir. 1995).

In contrast, the claim against the United States under the Tucker Act "must be one for money damages." *Mitchell*, 463 U.S. at 216. Because § 402(b) and the Tucker Act afford different relief, the exclusive jurisdiction of the D.C. Circuit under § 402(b) and the exclusive jurisdiction of the Court of Federal Claims can never reach the same type of claims. Therefore, § 402(b) cannot preempt the Tucker Act.

The courts below were able to characterize Petitioners' complaint as one for judicial review because they

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[21] To be subject to judicial review under the APA, an FCC order must be a "final disposition," 5 U.S.C. § 551(6), or a "final agency action." *Id.* § 704.

[22] The government enjoys sovereign immunity except to the extent waived, "and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

disregarded the type of relief that was in Petitioners' prayer for relief. Petitioners' claims can be mischaracterized, but an explicit prayer for monetary relief in the amount of $144 million cannot be characterized as a request for judicial review under the APA. The monetary relief Petitioners want is not be available from the D.C. Circuit on a § 402(b)(1) appeal, and it would not be available from the FCC on a remand from the D.C. Circuit. *See Certain Cellular RSA Applications*, 17 F.C.C.R. at 8515 (FCC lacks jurisdiction over claims for money damages and cannot award damages).

The Federal Circuit agrees that "'[c]ourts and litigants are best served by [a] bright-line rule' in matters involving jurisdiction." *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1367 (Fed. Cir. 2002) (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)). Prior to this case, courts and litigants enjoyed the bright-line rule that a "non-frivolous" implied-in-fact contract claim sufficed to invoke Tucker Act jurisdiction. Under the precedent set by the Federal Circuit below, a non-frivolous implied contract claim is subject to dismissal for want of jurisdiction if the "true nature" of the claim can be construed to be subject to the exclusive jurisdiction of another court. App. 27a n.13.

The Federal Circuit's decision will play havoc with the D.C. Circuit's jurisdiction. Obviously, the decision that Petitioners' claims for $144 million in damages from the federal government is subject to the exclusive jurisdiction of the D.C. Circuit is an affront to that court's *Kidwell* rule under which it refuses to entertain a claim that explicitly or essentially seeks more than $10,000 in relief from the government. *See* 56 F.3d at 284. Moreover, if a breach-of-contract claim for $144 million in damages can be considered a petition for review of an FCC decision "ancillary" to one of the types of decisions listed § 402(b), *see* App. 34a, there will be no limits to the D.C. Circuit's exclusive jurisdiction under § 402(b). That would be contrary to the intent of Congress to limit the reach of the FCC's jurisdiction to nine categories of cases. *See Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1006 (D.C. Cir. 1976).

III. THE FEDERAL CIRCUIT JUDICIALLY REPEALED THE TUCKER ACT IN PART AND IMMUNIZED THE FCC AGAINST CONTRACT LIABILITY

Although it was careful to speak in terms of preemption, the Federal Circuit effectively found that § 402(b) divests the Court of Federal Claims of its jurisdiction and that "would amount to a partial repeal of the Tucker Act." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984). And this Court has recognized that "repeals by implication are not favored." *E.g.*, *Cook County, Illinois v. United States ex rel Chandler*, 538 U.S. 119, 132 (2003). As the trial court seemed to concede below, there is no evidence that Congress intended to repeal the Tucker Act when it enacted § 402(b)(1) in 1952. *See* App. 53a-54a.

For a more recent statute to impliedly repeal an existing one, the legislative intent to repeal must be manifest in the "positive repugnancy" between the two statutes, *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 143 (2001), or in an "irreconcilable conflict" between the two, *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 381 (1996), or when the later act completely overlaps the earlier one. *See Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986). As the *Loveladies* test showed, there is no positive repugnancy between § 402(b) and the Tucker Act, since each statute "confers jurisdiction over cases that the other ... does not reach." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

"[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *NextWave*, 537 U.S. at 304 (quoting *J.E.M. Ag Supply*, 534 U.S. at 143-44). The Tucker Act and § 402(b) are capable of coexisting comfortably. If the Court of Federal Claims awards Petitioners the full relief they seek, the government would have to pay them $144 million. But the FCC would not be compelled to take any action, and no FCC order would be held unlawful and set aside. Likewise, the fact that the D.C. Circuit has reviewed and upheld the FCC's

regulatory actions will not prevent the Court of Federal Claims from awarding Petitioners $144 million in damages.[23] Lawful regulatory actions can nonetheless breach government contracts. *See United States v. Winstar Corp.*, 518 U.S. 839, 895-99 (1996) (plurality opinion). And damages are available without regard to the nature of the FCC's breach. *See Restatement* §346(1).

The availability of the remedy of judicial review under § 402(b) does not deprive Petitioners of their right to sue in the Court of Federal Claims unless Congress expressed its "unambiguous intention" to withdraw the Tucker Act remedy in the text or legislative history of § 402(b). *Preseault v. ICC*, 494 U.S. 1, 12 (1990). The text of § 402(b) provides a "right to appeal" and states that "[a]ppeals may be taken" from opinions and orders of the FCC to the D.C. Circuit. 47 U.S.C. § 402(b); App. 115a. The language of § 402(b) is permissive and cannot be construed to either establish a mandatory procedure for seeking redress or to make a remedy only available from the D.C. Circuit. Finally, it is significant that no mention is made of the Tucker Act in the legislative history of § 402(b). *See* S. Rep. No. 82-44, at 11 (1951). *See also Preseault*, 494 U.S. at 12 (no mention of the Tucker Act in statute or its legislative history suggests no congressional intent to repeal).

There is nothing to suggest that Congress intended a partial repeal of the Tucker Act when it enacted § 402(b). Nor is it possible to find any such intent with respect to non-overlapping statutes. That being the case, it was not for the Federal Circuit to withdraw Tucker Act jurisdiction over a common-law suit for damages for an FCC breach of contract. Considering its licensing mechanism of choice, the FCC is an especially poor candidate for a judicial grant of immunity from breach-of-contract claims.

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[23] *See Ranger Cellular v. FCC*, 333 F.3d 255 (D.C. Cir 2003) (petition for review of FCC's rulemaking decision denied); *Ranger*, 348 F.3d at 1048-50 (dismissing appeal of the award of three RSA licenses for lack of standing).

The FCC sells licenses at auctions for billions of dollars,[24] transactions that the trial court would view under common-law contract rules. *See Commodities Recovery*, 34 Fed. Cl. at 289. The FCC's actions in its role as an "offeror" in auctions has resulted in a Tucker Act breach-of-contract suit in the Court of Federal Claims. *See Cellco Partnership v. United States*, 54 Fed. Cl. 260 (2002). That remedy will be foreclosed under the Federal Circuit's decision below, because all damages claims arising from FCC decisions that are "ancillary" to those listed in § 402(b) will have to be taken to an appeals courts without authority to grant monetary relief. The decision is this case will bar a remedy in cases arising from the FCC's auctions, for there is no common-law difference between the FCC's role as offeror in an auction and its role as an offeror in a lottery.

IV. THE NATURE OF THE PROCEEDINGS BELOW CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

The Tucker Act was designed to give the people of the United States "the right to go into the courts to seek redress against the Government for their grievances." *Mitchell*, 463 U.S. at 214-15 (quoting 18 Cong. Rec. 2680 (1887)). Petitioners brought a legitimate grievance against a federal agency, expressed in a demand for money damages, to the one court with jurisdiction to award them damages. They have been denied their right to seek money damages because Respondent successfully argued that they "necessarily demanded" that the trial court "review" two orders of the WTB's staff and that their complaint "rested indispensably upon challenges" to the staff's orders and one WTB order.[25] Thus, Respondent contends that Petitioners are seeking judicial review simply because three non-final orders of the WTB were referred to in three paragraphs of their 325-

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[24] *See Requests for Refund of Down Payments Made in Auction 35*, 17 F.C.C.R. 6283, 6285-88 (2002).

[25] *See* Response to Combined Petition for Panel Rehearing and Rehearing *En Banc*, at 5 ("Response").

paragraph complaint. *See* App. 93a-94a, 95a (¶¶ 79, 81 and 89). The reference to the orders in Petitioners' statement of facts is insignificant since the orders post-date the FCC's 1996 breach of contract and are not appealable in any event.

As this Court will note, no reference is made to any order of the FCC in that portion of the complaint that states Petitioners' claims against the United States in seven breach-of-contract counts. *See id.* 97a-110a (¶¶ 97-206). Moreover, the prayer for relief does not include a demand for a judgment on any FCC order. *See id.* 110a-111a. Most notably, the only form of relief listed in the prayer for relief is the award of money damages. *See id.* Petitioners seek no relief which would have caused the trial court to read the two staff orders, much less "review" their merits. *See id.*

Respondent also claimed that Petitioners specifically alleged that the WTB "summarily rejected" the same contract claims that they advanced in the trial court, and that they "asked the trial court to overturn" the WTB's action. Response, *supra*, at 6. The WTB "summarily rejected" High Tower's contract claim in March 2001, but that claim was not the same as Petitioners' contract claims. App. 95 (¶ 89). High Tower first made its implied-in-fact contract claims in April 2001, when it appealed the WTB's decision to the Commission. App. 96a (¶¶ 92, 93). *A contract claim similar to that of Petitioners' was never before the WTB and never rejected in a WTB order.* The FCC did not reach High Tower's implied contract claims until May 2002, when it agreed that it lacked jurisdiction to entertain claims for money damages and that the issues are "within the exclusive jurisdiction of the United States Court of Federal Claims." *Certain Cellular RSA Applications*, 17 F.C.C.R. at 8515. Thus, the FCC lacked the authority to render any decision that Petitioners would need to "overturn."

The Federal Circuit identified the FCC decision "not to hold relotteries [that] was announced by public notice and subsequently explained in another public notice" as the "appealable decision" under § 402(b). App. 29a n.14. Relying on *In re FCC*, 217 F.3d 125, 140 n.10 (2nd Cir.

2000), the Federal Circuit had "no difficulty" concluding that the cancellation of the relotteries denied Petitioners the ability to obtain the licenses by lottery. *Id.* However, the staff's public notice of September 10, 1996 announced that the scheduled relottery had been *postponed*, meaning that it had been "put off to a later time." If there had been a "cancellation" of the relotteries, the staff concealed that fact.

As the court recognized in *In re FCC*, "A regulatory action short of a decision or order is an exercise of regulatory discretion that is *not* subject to review." 217 F.3d at 140 n.10 (emphasis in original). The staff's public notice postponing the relottery pending a Commission decision cannot be a final FCC "decision or order" appealable under § 402(b). Thus, the Federal Circuit essentially held that Petitioners seek judicial review of an FCC decision made off-the-record, never publicly acknowledged, and not subject to judicial review.

As the Court of Federal Claims once observed, "Our American system of justice ... does embody the right to adjudicate claims somewhere in the system." *Bailey v. United States*, 46 Fed. Cl. 187, 216 (2000). Petitioners have been denied the right to adjudicate their claims in the court that can grant them relief, because the courts below held that they should have taken their claims to an appeals court that cannot grant them relief. The system of justice failed in this case because two courts did not see the distinction between a suit for money damages for a breach of contract by the FCC and an appeal to have a final order of the FCC held unlawful and set aside.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 16, 2005

APPENDIX A

United States Court of Appeals
for the Federal Circuit

03-5124

GENE A. FOLDEN, COASTAL COMMUNICATIONS ASSOCIATES, and JUDITH A. LONGSHORE,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant.

DECIDED: August 16, 2004

Talbot D'Alemberte, of Tallahassee, Florida, argued for plaintiffs-appellants. On the brief was Russell D. Lukas, Lukas, Nace, Gutierrez & Sachs, Chartered, of Washington, DC.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Peter D. Keisler, Assistant Attorney General; and David M. Cohen, Director. Of counsel on the brief were Susan L. Launer and Roberta L. Cook, Attorneys, Federal Communications Commission, of Washington, DC.

Before SCHALL, GAJARSA, and PROST, Circuit Judges.

SCHALL, Circuit Judge.

Gene A. *Folden*, Coastal Communications Associates ("Coastal"), and Judith A. Longshore (collectively, "plaintiffs") appeal the decision of the United States Court of Federal Claims (i) granting the United States' motion to dismiss for failure to state a claim upon which relief could be granted, and (ii) granting the United States' motion to dismiss for lack of subject-matter jurisdiction. *Folden v. United States*, 59 Fed. Cl. 43 (2003). On the first point, the court determined that plaintiffs failed to state a claim for breach of contract because they were unable to establish the existence of an implied-in-fact contract with the government arising from their filing of lottery applications for cellular communication licenses with the Federal Communications Commission (the "Commission"). *Id.* at 51-55. On the second point, the court determined that it lacked subject-matter jurisdiction over plaintiffs' claims because it concluded that decisions ancillary to the licensing power of the Commission fall within the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. § 402(b). *Id.* at 55-60.

We agree with the Court of Federal Claims that plaintiffs' claims are covered by subsection 402(b), which places them within the exclusive jurisdiction of the D.C. Circuit. Accordingly, we affirm the court's dismissal for lack of subject-matter jurisdiction.

BACKGROUND

I.

We begin by setting forth the evolution of the regulatory regime by which the Commission issues telecommunications licenses, for it is essential to understanding plaintiffs' theory of recovery in the case. By statute, the Commission is charged with granting applications for licenses if it finds that "public interest, convenience, and necessity would be served by the granting thereof . . . ." 47 U.S.C. § 309 (2000). To facilitate the allocation of cellular licenses, the Commission

divided the United States into two geographic markets—metropolitan statistical areas ("MSAs") and rural service areas ("RSAs"). *Folden*, 56 Fed. Cl. at 44. In each type of market, the Commission granted two competing licenses: "one to a 'wireline' operator, an established local telephone company, and the other . . . to a 'nonwireline' operator, any party other than an established local telephone company." *Id.* Plaintiffs are nonwireline operators in seven RSA markets. *Id.*

To award the first thirty MSA cellular licenses, the Commission employed comparative hearings.[1] *See Certain Cellular Rural Service Area Applications*, 14 F.C.C.R. 4619, 4619 (1999). In 1981, however, through an amendment to the Communications Act of 1934 ("Communications Act"), Congress authorized the Commission to allocate licenses by a system of random selection or lottery. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, ch. 2, § 1242, 95 Stat. 357, 736-37 (1981) (codified at 47 U.S.C. § 309(i)). The House of Representatives conference report explained that "[b]y the establishment of basic qualifications and the elimination of initial comparative hearings, the conferees intend that much of the present delay and expense can be eliminated with no adverse effect on the provision of services to the public." H.R. Conf. Rep. No. 97-208, at 897, *reprinted in* 1981 U.S.C.C.A.N. 1010, 1259. However, despite agreeing that a lottery would speed service to the public, the Commission declined to adopt a lottery process for allocating telecommunications licenses. *Selection from Among Mutually Exclusive Competing Applications Using*

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[1]Historically, the Commission conducted "comparative hearings" to determine which applicant would best serve the statutory goals of public interest, convenience, and necessity. In comparative hearings, the Commission examined and compared each applicant based on diversification of media control, integration of management and ownership, previous broadcast experience, character, financial capability, and minority ownership. *See* 47 U.S.C. § 309; *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965).

Random Selection or Lotteries Instead of Comparative Hearings, 89 F.C.C.2d 257, 258, 282-83 (1982) (explaining that although it was clear that Congress intended for the Commission to implement lotteries, various considerations led the Commission to conclude that "the public interest would best be served by declining to implement this statute").

In response, Congress passed a revised lottery statute, which imposed upon the Commission the mandatory requirement that lottery rules and procedures be adopted within 180 days. Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1087, 1094-95 (1982) (codified at 47 U.S.C. § 309(i) as amended); H.R. Conf. Rep. 97-765, at 38, *reprinted in* 1982 U.S.C.C.A.N. 2261, 2282 ("1982 Conf. Rep."). Congress instructed that upon selecting a lottery winner, the Commission was to determine whether the winner was qualified pursuant to 47 U.S.C. §§ 308(b), 309(a) (2000).[2] 1982 Conf. Rep. at 39, *reprinted in* 1982 U.S.C.C.A.N. at 2283. If the initial winner was determined to be unqualified, the Commission was to conduct a "subsequent lottery . . . with the same applicant pool with each applicant's selection probabilities recomputed as necessary . . . ." *Id.*

In 1984, the Commission adopted rules for awarding cellular licenses by lottery. 47 C.F.R. §§ 1.821-1.823, 22.33

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[2]As noted above, section 309(a) requires the Commission to grant licenses by determining whether "the public interest, convenience, and necessity will be served by the granting of such application . . . ." 47 U.S.C. § 309(a). Section 308(b) sets forth matters into which the Commission may inquire, including the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used . . . . *Id.* § 308(b).

(1984); *see also Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 F.C.C.2d 175, 175, app. B (1984) (explaining the amendments to the regulations providing for the use of lotteries for awarding cellular licenses). Pursuant to the regulations, the Commission was allowed to employ a random selection process, or lottery, to choose the "tentative selectee" from among mutually exclusive license applicants. 47 C.F.R. § 1.822(b). Once the tentative selectee was named, the lottery continued with each of the remaining applicants, with the Commission ranking them in the order in which they were selected as "alternative selectees." *Id.* The Commission would award the license to the tentative selectee only after determining that it was qualified. *Id.* If it were not, the Commission would name the next-ranked alternative selectee as the new tentative selectee and then evaluate its qualifications, repeating the process until the license was awarded. *Id.*

In 1988, the Commission amended the rules pertaining to lotteries. Under the amended regulations, after the tentative selectee was named, each remaining applicant was no longer to be randomly selected and ranked in order of selection. Rather, in accordance with the amended version of 47 C.F.R. § 1.823(a), the Chief of the Common Carrier Bureau and the Managing Director of the Commission were to determine, on a case-by-case basis, the number of remaining applicants to be selected, and thus ranked as alternative selectees, in each lottery. 47 C.F.R. § 1.823(a) (1989); *Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries in the Public Land Mobile and Domestic Cellular Radio Telecommunications Services*, 4 F.C.C.R. 7294 (1988).

This was the state of the regulatory regime when plaintiffs filed their applications for cellular licenses in 1988.

II.

We now turn to the process by which plaintiffs applied for cellular licenses. On May 19, 1988, the Commission issued a list of the 428 RSAs for which lotteries would be held and identified the counties that comprised each RSA. *Listing of Cellular Rural Service Areas With Component Parts*, 53 Fed. Reg. 18,133 (Dep't Commerce May 10, 1988). Plaintiffs submitted applications to the Commission for cellular licenses in seven RSAs. Mr. Folden applied for a cellular license in the Florida 11-Monroe ("Fla. 11") RSA on Nov. 4, 1988, and submitted a $200 filing fee. *Folden*, 56 Fed. Cl. at 45. Coastal submitted a $1400 filing fee with its applications for cellular licenses in the following seven RSAs: Fla. 11 (filed Nov. 4, 1988), North Dakota 3-Barnes ("N.D. 3") (filed Sept. 9, 1988), Minnesota 11-Goodhue ("Minn. 11") (filed Sept. 16, 1988), Texas 21-Chambers ("Tex. 21") (filed Oct. 7, 1988), Arkansas 9-Polk ("Ark. 9") (filed Oct. 28, 1988), Puerto Rico 5-Ceiba ("P.R. 5") (filed Nov. 10, 1988), and Pennsylvania 4-Bradford ("Pa. 4") (filed Dec. 9, 1988). *Id.* Finally, Michael D. Longshore, the now deceased husband of Ms. Longshore, paid $800 in filing fees for his applications in the N.D. 3, Minn. 11, Tex. 21, and Pa. 4 RSAs. *Id.*

The Commission issued lottery notices naming plaintiffs among those whose applications had been accepted for filing and providing the date upon which each lottery would occur. The lottery notices explained that each application had been assigned a code number, and that one code number would be drawn for each RSA. Furthermore, each notice stated, "In the event that the application selected cannot be granted, another lottery will be held for that market and another application will be selected from the remaining applications."

Lotteries for the seven licenses were held on the following dates in 1989: April 13 (N.D. 3), May 4 (Minn.

11), June 14 (Tex. 21), August 9 (Ark. 9), August 23 (Fla. 11), September 20 (P.R. 5), and November 8 (Pa. 4). Am. Class Action Compl., ¶¶ 32-39. Only one applicant, the tentative selectee, was chosen in each lottery; none of the plaintiffs was chosen as a tentative selectee. *Folden*, 56 Fed. Cl. at 45. Competing applicants for these seven licenses subsequently opposed the tentative selectees in proceedings before the Commission. Am. Class Action Compl., ¶ 40. The Commission ultimately determined that none of the tentative selectees was qualified, and their applications were dismissed.[3] *Folden*, 56 Fed. Cl. at 45.

On January 29, 1992, the Commission announced that it would hold relotteries for twenty-nine RSAs, including Tex. 21, on April 8, 1992. This relottery notice stated, "The new lotteries will be conducted among the applications which have already been filed for these markets, minus the dismissed applications. No new applications for these markets will be accepted." As had been the case in the original lottery, each application was to be assigned a code number, only one code number would be drawn for each RSA, and "[i]n the event that the application selected cannot be granted, another lottery will be held for that market and another application will be selected from the remaining applications." The Tex. 21 relottery was held on April 8, and on April 9, the Commission issued the results; neither Coastal nor Mr. Longshore was chosen as the new tentative selectee. However, the new tentative selectee, Alee Cellular Communications ("Alee"), was later disqualified by the

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[3] The original tentative selectees for the Minn. 11, Fla. 11, and Pa. 4 RSAs were dismissed, for example, because their percentage of foreign ownership exceeded the then-applicable statutory limits as set forth in 47 U.S.C. § 310(b)(1), (3) and 47 C.F.R. § 22.4. *In re Applications of Cellwave Telephone Services L.P., FutureWave General Partners L.P., and Great Western Cellular Partners*, 7 F.C.C.R. 5955 (1992). These dismissals were affirmed by the D.C. Circuit. *Great W. Cellular Partners v. FCC*, 72 F.3d 919 (D.C. Cir. 1995); *Cellwave Tel. Servs. L.P. v. FCC*, 30 F.3d 1533 (D.C. Cir. 1994).

Commission on July 24, 1994, and its application was denied. Due in part to events that followed, the Commission never conducted a second relottery for the Tex. 21 RSA.

III.

While plaintiffs' applications were still pending before the Commission, Congress intervened in the process. In 1993, Congress added subsection 309(j) to the Communications Act of 1934. The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. VI, § 6002(a), 107 Stat. 312, 387-92 (1993) (codified at 47 U.S.C. § 309(j)) ("Auction Statute"). Subsection 309(j) authorized the Commission to use auctions as a method of selecting among mutually exclusive applications for cellular licenses. The statute also permitted the Commission to continue to use lotteries for applications accepted for filing prior to July 26, 1993. *Id.* § 6002(e)(2), 107 Stat. at 397.

On March 8, 1994, the Commission adopted rules for implementing the Auction Statute. 47 C.F.R. §§ 1.2101-1.2111 (1994); *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 F.C.C.R. 2348 (1994). For those applications filed prior to July 26, 1993, such as plaintiffs', the Commission decided to continue to use lotteries, rather than auctions, to resolve pending applications for cellular unserved areas. *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 F.C.C.R. 7387, 7390-93(1994). Accordingly, in August 1994, the Commission issued a revision of its licensing rules:

> Pending applications for authority to operate the first cellular system on a channel block in an MSA or RSA market continue to be processed under the rules governing the processing of such applications that were in effect when those applications were filed,

> unless the Commission determines otherwise in a particular case.

Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 9 F.C.C.R. 6513, app. B (1994) (setting forth 47 C.F.R. § 22.959 (1995)). At the time plaintiffs' applications were filed in 1988, 47 C.F.R. § 22.33 provided for the use of lotteries to distribute cellular licenses.

On July 12, 1996, the Commission issued a relottery notice for six of the seven RSAs at issue (Ark. 9, Fla. 11, Minn. 11, N.D. 3, Pa. 4, and P.R. 5), setting the relottery date for September 18, 1996. As it had done in the case of the January 29, 1992 relottery notice for the Tex. 21 RSA, the Commission explained that each application had been assigned a code number, that only one code number would be drawn for each unserved area, and that "[i]n the event that the application selected cannot be granted, another lottery will be held for that unserved area and another application will be selected from the remaining applications."

However, on September 9, 1996, just before the relotteries were to be held for these six RSA licenses, Cellular Communications of Puerto Rico ("CCPR") filed an *ex parte* petition requesting that the Commission issue a declaratory ruling that an auction, as opposed to a lottery, would be employed for the P.R. 5 RSA. *Folden*, 56 Fed. Cl. at 47. In the alternative, CCPR requested that the Commission initiate a rulemaking proceeding to determine whether an auction should be used for this market. *Id.* On September 10, the Commission's Wireless Telecommunications Bureau (the "Bureau") issued a public notice postponing the six relotteries. *Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas*, FCC Public Notice, Mimeo No. 65051 (Sept. 10, 1996). On October 24, 1996, the Bureau issued the following explanation:

> [CCPR's] petition raises issues concerning the broader applicability of the use of competitive bidding to award cellular licenses for RSAs for which applications were filed prior to July 26, 1993, where the original tentative selectee has been disqualified and no license has been awarded to date. We will therefore treat CCPR's petition as a petition for rulemaking, and request comment on it, as well as on the applicability of awarding cellular market licenses via competitive bidding in all cellular markets for which applications were filed with the Commission prior to July 26, 1993, and the original lottery winner has been disqualified.

Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used to License Certain Cellular Rural Service Areas, FCC Public Notice, DA 96-1685 (Oct. 24, 1996) ("*CCPR Petition*").

IV.

Unsatisfied with the Commission's response to its action allowing for the use of auctions rather than lotteries, Congress again injected itself into the licensing process. On August 5, 1997, Congress passed the Balanced Budget Act of 1997, which repealed section 6002(e) of the Auction Statute, which had preserved the Commission's ability to use lotteries for applications filed prior to July 26, 1993. In addition, Congress terminated the Commission's authority to hold lotteries for any license applications except applications for noncommercial educational and public broadcast stations. Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. III, § 3002(a)(2)(B), (a)(4), 111 Stat. 251, 258, 260 (1997) (codified at 47 U.S.C. § 309(i)(5)) ("1997 Budget Act"). Following Congress' action, the Bureau dismissed all

pending cellular lottery applications for the following six RSAs: N.D. 3, Minn. 11, Ark. 9, Fla. 11, P.R. 5, and Pa. 4. *Certain Cellular Rural Service Area Applications*, 14 F.C.C.R. 4619 (1999). The Bureau further determined that the applicants did not qualify for refunds of their filing fees. *Id.* at 4621. The Coastal and Longshore applications for the Tex. 21 RSA were similarly dismissed without a refund of their filing fees by the Bureau. Certain Cellular Rural Service Area Applications in Market Nos. 599A and 672A, No. DA 99-814 (Apr. 29, 1999). Plaintiffs' request for reconsideration of the dismissals was denied by the Bureau. *Certain Cellular Rural Service Area Applications in Market Nos. 599A and 672A*, 16 F.C.C.R. 4860 (2001).

Congress subsequently reinstated the original tentative selectees for three of the seven RSAs at issue on December 21, 2000. Launching Our Communities' Access to Local Television Act of 2000, Pub. L. No. 106-553, tit. X, § 1007, 114 Stat. 2762A-128, 2762A-138-40 ("Local TV Act"). In accordance with the statute, the Commission announced on March 16, 2001, that licenses for the Fla. 11, Minn. 11, and Pa. 4 RSAs had been granted to the original tentative selectees. *Wireless Telecommunications Bureau Grants Rural Cellular Licenses*, 16 F.C.C.R. 5601 (2001).

On January 13, 2001, the Commission proposed rules for auctioning cellular licenses in the four remaining RSAs at issue: Ark. 9, N.D. 3, Tex. 21, and P.R. 5. *Competitive Bidding Rules*, 16 F.C.C.R. 4296 (2001). On January 16, 2002, the Commission adopted rules to govern auctions for licenses in these four RSA markets, in which no tentative selectee had been selected by relottery prior to July 1, 1997, and for which Congress had not directed the Commission to reinstate the original tentative selectee. 47 C.F.R. §§ 22.228-22.229, 22.969 (2002); *Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 17

F.C.C.R. 1960 (2002). The interim operators[4] won the bidding for the Ark. 9, N.D. 3, and P.R. 5 licenses. *Cellular Rural Service Areas Auction Closes*, 17 F.C.C.R. 10582 (2002). On November 1, 2002, a Commission Administrative Law Judge dismissed the application of Alee, the winner of the relottery, for the Tex. 21 license. *In re Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672A*, WT Docket No. 02-28, File No. 11025-CL-P-672-A-89 (Nov. 1, 2002).

V.

A.

Plaintiffs did not request review or reconsideration by the full Commission of the Bureau's orders dismissing their applications.[5] *Folden*, 56 Fed. Cl. at 48. Instead, they filed a

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[4]In the four RSAs in which Congress did not reinstate the original tentative selectees, Ark. 9, N.D. 3, Tex. 21, and P.R. 5, the Commission had granted interim operating authority, pending relotteries, to cellular telephone licensees in adjacent areas to provide service. *Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 16 F.C.C.R. 4296, 4301 & n.21 (2001) ("*Competitive Bidding Rules*").

[5]Plaintiffs were required to file a petition for review of the dismissal of their applications with the full Commission, as a condition precedent to judicial review of the agency's decision. 47 U.S.C. § 155(c)(7) (2000). Section 155(c)(7) imposes this requirement for orders and actions taken pursuant to 47 U.S.C. § 155(c)(1). Subsection 155(c)(1) applies to orders that involve the Commission's delegation of its functions. In this case, plaintiffs' applications were dismissed by the Bureau, to which the Commission has delegated that function pursuant to 47 C.F.R. § 0.131. Accordingly, plaintiffs were required to comply with section 155(c)(7) in order to preserve their right to judicial review of the dismissal of their applications. *See, e.g., Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997) (dismissing the appeal because the petitioners had not sought review of the agency order by the full Commission as required by section 155(c)(7)); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387 (D.C. Cir. 1999) (dismissing the appeal as premature because the Commission had not yet ruled on the pending petition for review).

class action complaint in the Court of Federal Claims, which they subsequently amended. *Id.* In their amended complaint, plaintiffs alleged breach of implied-in-fact contracts by the Commission, takings in violation of the Fifth Amendment, and unconstitutional takings of their contract rights in violation of Article III of the U.S. Constitution.[6] Plaintiffs sought to recover $144,088,000 in damages. In addition, plaintiffs filed a motion to certify a purported class consisting of all applicants whose applications the Commission had accepted in 1988 for the seven RSA licenses at issue, excluding those who were chosen as tentative selectees and subsequently disqualified. *Id.* The government responded by filing a motion to dismiss for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim upon which relief could be granted. *Id.* at 51. The court granted the government's additional motion to stay consideration of plaintiffs' request

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[6]Plaintiffs' takings claim was based on the theory that the government took their contract rights without paying just compensation. Plaintiffs contended that the Commission's decision to cancel the relotteries for the seven RSAs at issue, in anticipation of congressional revocation of the Commission's authority to hold lotteries for cellular licenses, violated the Takings Clause of the Fifth Amendment. *Folden*, 56 Fed. Cl. at 60.

Plaintiffs' theory of a taking of their contract rights in violation of Article III was as follows: The D.C. Circuit affirmed the Commission's decision that the original selectees for the Mian. 11, Fla. 11, and Pa. 4 RSAs were ineligible to hold the licenses. *See supra*, note 3. According to plaintiffs, these decisions of the D.C. Circuit "vested" in plaintiffs the contractual right to a relottery for those three RSA licenses. Plaintiffs allege that when Congress subsequently awarded the licenses for these three RSAs to the original selectees by statute, the government "unconstitutionally appropriated the[ir] contract rights" by eliminating their chances of winning a relottery for the three RSAs. *Folden*, 56 Fed. Cl. at 60.

The Court of Federal Claims dismissed all of plaintiffs' constitutional claims, and plaintiffs have chosen not to appeal that ruling.

for class certification pending resolution of the motion to dismiss. *Id.* at 48.

B.

The Court of Federal Claims dismissed plaintiffs' amended complaint for failure to state a claim upon which relief could be granted. *Id.* at 51-55. The court assumed that it had jurisdiction to entertain plaintiffs' breach of implied-in-fact contract claims, in part "because certain case precedent suggests that almost any implied-in-fact [contract] allegation gives [the Court of Federal Claims] jurisdiction to review such claims."[7] *Id.* at 52. Reciting the elements of an implied-in-fact contract (mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance, and authority to bind the government), the court found lacking mutuality of intent to contract. Id. at 52-53. The court declined to adopt plaintiffs' argument that 47 C.F.R. §§ 1.823 and 22.33(a) constituted contractual promises by the Commission to hold lotteries or relotteries. *Id.* at 53. Rather, because agency rules are subject to change in accordance with recognized procedures, especially when mandated by statute as in this case, and because the regulations did not prohibit the Commission from changing its lottery rules in the future in accordance with those recognized procedures, the court concluded that neither the regulations nor the lottery notices contractually bound the Commission to hold lotteries or relotteries within a definite time, before the statutory change occurred. *Id.* at 53-54.

The court further relied upon 47 C.F.R. § 22.959 (1995), which provided for the award of cellular licenses by lottery "unless the Commission determines otherwise in a particular

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[7]The court prefaced its initial assumption of subject-matter jurisdiction, however, with the caveat that "logically, plaintiffs' complaint, based on FCC decisions to dismiss plaintiffs' applications, should be reviewed in the United States Court of Appeals for the District of Columbia and not in this court." *Folden*, 56 Fed. Cl. at 52.

case." *Id.* at 54. This demonstrated to the court that the Commission had not manifested a clear intent to be obligated to use lotteries. *Id.* The court also invoked the "well established rule" that an agency such as the Commission is permitted to modify its rules pursuant to rulemaking proceedings and must follow the mandates of Congress. Id. Specifically, the D.C. Circuit has ruled that the Commission has the discretion to change license allocation procedures midstream, though it may disrupt the applicants' expectations and alter the competitive balance among them. *Id.* (citing, *inter alia, Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 687-88 (D.C. Cir. 2001)). In conclusion, the court determined that "[t]he long tradition of Commission authority to change rules effectively precluded the FCC from making a contractual promise to the plaintiffs." *Id.* at 55. Because plaintiffs could not establish the Commission's intent to contract, the court ruled that plaintiffs' claims for breach of implied-in-fact contracts failed. *Id.*

C.

The Court of Federal Claims also ruled in favor of the United States on its motion to dismiss for lack of subject-matter jurisdiction. *Id.* at 55-60. The court explained that 47 U.S.C. § 402(b) reserves judicial review of Commission licensing decisions exclusively for the D.C. Circuit. *Id.* at 56. Because the statutory term "station license" in subsection 402(b)(1) encompasses personal communications service ("PCS") licenses, which, in turn, include licenses for cellular telephone service, the court concluded that an appeal by any applicant for a cellular license whose application is denied by the Commission falls within the scope of that subsection. *Id.* (citing *Nextwave Pers. Communications, Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001)). The court then explained that pursuant to *Cook, Inc. v. United States*, 394 F.2d 84, 84-85 (7th Cir. 1968), and *Kessler v. FCC*, 326 F.2d 673, 679 n.4 (D.C. Cir. 1963), and as confirmed by later D.C. Circuit decisions, subsection 402(b) extends to

Commission decisions that are "ancillary" to the nine types of licensing decisions expressly enumerated therein. *Folden*, 56 Fed. Cl. at 56-57. Plaintiffs' claims, according to the court, involved a decision ancillary to those in subsection 402(b). *Id.* at 57.

The court was unpersuaded by plaintiffs' argument that the Bureau's dismissals of their applications did not constitute final decisions of the Commission and therefore did not trigger subsection 402(b). *Id.* Plaintiffs also argued that because they were seeking money damages, the D.C. Circuit could not have had, and the Court of Federal Claims did have, jurisdiction over their claims. *Id.* at 57-58. The court concluded that plaintiffs' attempt to circumvent established agency and federal court procedures "conjured a contract theory from the mere chance to obtain a cellular license following submission of their applications" in the absence of any contract negotiations and documents. *Id.* at 57. The court added that plaintiffs had offered no precedent to support their theory of an implied-in-fact contract. *Id.* at 59. Thus, the court found plaintiffs' claims to be one of those "instances in which a claim that is otherwise within the court's jurisdiction is so insubstantial on its merits that a dismissal may be termed jurisdictional." *Id.* (quoting *Lewis v. United States*, 70 F.3d 597, 603 (Fed. Cir. 1995)). According to the court, "[t]o acknowledge the possibility of the existence of a contract under these circumstances for the purposes of jurisdiction, only to, ultimately, find no contract in existence, is to undermine statutory and regulatory procedures carefully designed to address grievances associated with FCC licensing applications." *Id.* The court therefore dismissed plaintiffs' claims for breach of implied-in-fact contracts.

This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

ANALYSIS

I.

Whether the Court of Federal Claims properly dismissed plaintiffs' amended complaint for lack of subject-matter jurisdiction is a question of law that we review *de novo*. *W. Co. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003). Subject-matter jurisdiction may be challenged at any time by the parties or by the court *sua sponte*. *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998). In deciding whether there is subject-matter jurisdiction, "the allegations stated in the complaint are taken as true and jurisdiction is decided on the face of the pleadings." *Shearin v. United States*, 992 F.2d 1195, 1195-96 (Fed. Cir. 1993).

II.

In this case, plaintiffs allege subject-matter jurisdiction in the Court of Federal Claims under the Tucker Act, which provides as follows:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2000). Although the Tucker Act waives the sovereign immunity of the federal government, it does not provide any substantive rights. *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983). In order to invoke successfully the jurisdiction of the Court of Federal Claims pursuant to the Tucker Act, a plaintiff must identify a right to

money damages found in the Constitution, a statute or government regulation, or a contract. *Id.*

To establish Tucker Act jurisdiction in this case, plaintiffs allege implied-in-fact contracts with the Commission. In their amended complaint, they assert that the Commission breached implied-in-fact contracts to hold relotteries to award cellular licenses for the seven RSAs at issue. Plaintiffs' theory is as follows: The Commission released "offers," in the form of public notices, requesting applications for the seven RSA cellular licenses that it planned to award by lottery. Plaintiffs "accepted" those offers by preparing and timely filing letter-perfect applications, and plaintiffs provided "consideration" by paying the requisite filing fees for the seven licenses in accordance with the Commission's lottery rules and procedures. The Commission then issued lottery notices that named plaintiffs as among those whose applications had been accepted, constituting "public acknowledgement" that plaintiffs had fulfilled the necessary requirements to apply for the lotteries. The Commission further promised to hold relotteries for each of the seven RSA licenses should none of the initial winners be qualified, and the Commission confirmed this promise upon disqualifying the original tentative selectee in each of the seven RSAs.

Plaintiffs contend that the Commission's contractual obligations to conduct a relottery for each RSA license arose on the date that the initial lottery winner's application was dismissed or denied. According to plaintiffs, the Commission breached those contracts when it failed to hold relotteries for six of the seven licenses for which plaintiffs had applied, and when it failed to hold a second relottery for the Tex. 21 RSA. For six of the RSA licenses, plaintiffs identify the date of the originally scheduled relotteries, September 18, 1996, as the date of the Commission's breach. For the Tex. 21 RSA, plaintiffs identify April 17, 1997, as the date of the Commission's breach, because between

November 25, 1996, and April 17, 1997, plaintiffs assert, "various applicants made formal demands that re-lotteries be held for all remaining RSAs, including Tex. 21," which the Commission allegedly ignored.

Having explained plaintiffs' theory of Tucker Act jurisdiction, we now turn to the statutory and regulatory regime of the Communications Act.

III.

A.

Congress has vested the district courts with jurisdiction over enforcement of Commission orders. 47 U.S.C. § 401(b) (2000). At the same time, in 47 U.S.C. § 402, it has provided for judicial review of Commission decisions. Subsection 402(a) provides:

> (a) Procedure. Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [28 U.S.C. §§ 2342-2351].

In turn, section 2342 of title 28 provides for the courts of appeals to have exclusive jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" all final orders of the Commission made reviewable by subsection 402(a). 28 U.S.C. § 2342 (2000). Section 2343 sets the proper venue as either the judicial circuit in which the petitioner resides or has its principal office, or the D.C. Circuit. *Id.* § 2343.

Subsection 402(b), by contrast, specifically provides for the D.C. Circuit to have jurisdiction with respect to the following Commission decisions:

(b) Right to appeal. Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act [47 USCS § 325] whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) hereof.

> (7) By any person upon whom an order to cease and desist has been served under section 312 of this Act [47 USCS § 312].
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> (8) By any radio operator whose license has been suspended by the Commission.
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> (9) By any applicant for authority to provide interLATA services under section 271 of this Act [47 USCS § 271] whose application is denied by the Commission.

By their plain language, subsections 402(a) and (b) are mutually exclusive. When section 402 was amended in 1952 to its current form, the Senate Committee stated, "The language of this subsection [402(b)], when considered in relation to that of subsection (a), also would make it clear that judicial review of all cases involving the exercise of the Commission's radio licensing power is limited to that court [the D.C. Circuit]." S. Rep. No. 44, at 10 (1951), *cited in Cook*, 394 F.2d at 86. Appeals from all decisions of the Commission that do not fall within subsection 402(b) are encompassed by the procedures of subsection 402(a). *See Columbia Broad. Sys. v. FCC*, 211 F.2d 644, 647 (D.C. Cir. 1954).

We think it clear that the D.C. Circuit's jurisdiction over claims that fall within subsection 402(b) is exclusive.[8] The Supreme Court has ruled that the statutory jurisdiction of the courts of appeals over claims that fall within the scope of subsection 402(a) is exclusive. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("Exclusive jurisdiction for review of final FCC orders, such as the FCC's denial of respondents' rulemaking petition, lies in the

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[8] Neither party contends that subsection 402(a) applies to plaintiffs' claims; rather, the parties dispute whether plaintiffs' claims fall within the scope of subsection 402(b).

Court of Appeals." (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)). It follows that the D.C. Circuit's jurisdiction pursuant to subsection 402(b) is also exclusive: subsections 402(a) and (b) comprise the entire statutory regime by which parties may obtain judicial review of Commission decisions.[9] Moreover, it has been long settled by the D.C. Circuit that its jurisdiction over claims brought pursuant to subsection 402(b) is in fact exclusive. *Sykes v. Jenny Wren Co.*, 78 F.2d 729 (D.C. Cir.) (concluding for the first time that the jurisdiction of the D.C. Circuit pursuant to subsection 402(b) is exclusive), *cert. denied*, 296 U.S. 624 (1935);[10] *City of*

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[9]We addressed the exclusivity of a statutory grant of jurisdiction in *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210, 1215 (Fed. Cir. 1990). Amerikohl filed suit in the United States Claims Court seeking reimbursement of reclamation fees allegedly paid in excess of the statutory requirement under the Surface Mining Control and Reclamation Act of 1977, 30 U.SC. §§ 1201-1328 ("SMCRA"). *Amerikohl*, 899 F.2d at 1211. The government challenged the subject-matter jurisdiction of the Claims Court, arguing that pursuant to 30 U.S.C. § 1276(a)(1), the United States District Court for the District of Columbia had exclusive jurisdiction to consider challenges to regulations promulgated under SMCRA. The Claims Court agreed. *Id.* at 1212. We sustained the ruling on appeal after finding the statute plain and unambiguous in its grant of exclusive jurisdiction to the district court. We explained:

> Where "Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word 'exclusive' in the statute providing a forum for judicial review." Thus, regardless of how Amerikohl characterizes the present action, Amerikohl is precluded from challenging the validity of regulations promulgated under section 1276(a)(1) because it is in the wrong court . . . .

Id. at 1215 (quoting *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 356 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973)). Similarly, if subsection 402(b) applies in this case, plaintiffs too are in the wrong court, having failed to follow the statutory scheme.

[10]*Sykes* followed earlier precedent similarly construing the predecessor of subsection 402(b), section 16 of the Radio Act of 1927,

Rochester v. Bond, 603 F.2d 927, 932-35 (D.C. Cir. 1979) ("In § 402 of the Communications Act . . . Congress has, we think, prescribed the exclusive mode of judicial review of such controversies as this . . . .") (relying on *Sykes*); *Sprint Communications Co. L.P. v. FCC*, 274 F.3d 549, 552 (D.C. Cir. 2001).

In the Communications Act, Congress enacted a comprehensive statutory and regulatory regime governing orders of the Commission. Congress vested the district courts with jurisdiction over enforcement of Commission orders, 47 U.S.C. § 401(b), and the courts of appeal and the D.C. Circuit with jurisdiction over judicial review of such orders, *id.* § 402(a), (b). At the same time, section 155(c)(7) requires a party to appeal first within the Commission before pursuing a judicial remedy pursuant to section 402. *Id.* § 155(c)(7); *see supra*, note 5. Congress also imposed various filing deadlines for appeals from Commission orders, provided for interested parties to receive notice of an appeal, required appeals to include specific information, and prescribed the procedure by which an interested party may intervene in appeal proceedings. *Id.* § 402(c)-(e). We have explained that "[w]hen such a 'specific and comprehensive scheme for administrative and judicial review' is provided by Congress, the Court of Federal Claims' Tucker Act jurisdiction over the subject matter covered by the scheme is preempted." *Vereda, LTDA v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (quoting *St. Vincent's Med. Ctr. v. United States*, 32 F.3d 548, 549-50 (Fed. Cir. 1994), and citing *United States v. Fausto*, 484 U.S. 439, 454-55 (1988); *Appalachian Reg'l Healthcare, Inc. v. United States*, 999 F.2d 1573, 1577 (Fed. Cir. 1993)).

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ch. 169, 44 Stat. 1166. *E.g., White v. Fed. Radio Comm'n*, 29 F.2d 113, 115 (N.D. Ill. 1928).

Plaintiffs contend, however, that the D.C. Circuit's jurisdiction pursuant to subsection 402(b) and Tucker Act jurisdiction for the Court of Federal Claims may coexist. In making this argument, they rely on *Cellco Partnership v. United States*, 54 Fed. Cl. 260 (2002). In *Cellco Partnership*, Cellco, doing business as Verizon Wireless, filed suit against the government in the Court of Federal Claims for breach of contracts allegedly formed when the Commission accepted its bid for reauctioned spectrum licenses. Cellco asserted that the Commission failed to timely deliver the licenses. At the same time, pursuant to subsection 402(b), Cellco appealed to the D.C. Circuit from the Commission's order relating to the refund of Cellco's down payment for the licenses. *Id.* at 261. Citing the possibility of inconsistent rulings by the two tribunals, the government moved to stay proceedings in the Court of Federal Claims, but the motion was denied. In denying the motion to stay, the court noted that the D.C. Circuit could decide that it lacked jurisdiction to decide the contract claim. It also noted that the D.C. Circuit lacked jurisdiction to decide Cellco's money damages claim. *Id.* at 262-63.

Plaintiffs' reliance on *Cellco Partnership* is misplaced. We are not bound by decisions of the Court of Federal Claims. In any event, to the extent that the decision suggests that the Court of Federal Claims may exercise concurrent jurisdiction with the D.C. Circuit over claims that fall within the scope of subsection 402(b), we reject it. The availability of concurrent jurisdiction in district court over claims under subsection 402(b) was explicitly rejected in *City of Rochester*, 603 F.2d 927. While recognizing that subsection 402(b) did not specify whether concurrent jurisdiction in the district court could exist, the D.C. Circuit nevertheless concluded that it could not. *Id.* at 932. The court ruled that the plaintiffs' suit to set aside the Commission's issuance of a construction permit, which is encompassed by subsection 402(b), could not be brought in district court. The court's

logic applies with equal force to the possibility of concurrent jurisdiction in the Court of Federal Claims. The court stated:

> The principles which frame our decision are uexceptionable . . . Congress, acting within its constitutional powers, may freely choose the court in which judicial review may occur . . . . If . . . there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.
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> The rationale for statutory review is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts. The choice of forum is, as we have said, for Congress . . . .

Id. at 931 (citing *City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958)); id. at 936. The court further noted that finding concurrent jurisdiction under a general jurisdictional mandate (such as the Tucker Act in this case) would "completely undo" the requirement of a timely petition for review and the finality of agency orders, which Congress deliberately chose to include in the statutory scheme, "a choice [the court] may not second-guess." Id. at 935.* Plaintiffs' suit is indistinguishable from *City of Rochester.*

In sum, if subsection 402(b) applies in this case, the D.C. Circuit had exclusive jurisdiction over plaintiffs' claims.[11] It is to that question that we now turn.

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[11]The Court of Federal Claims explained, and it is conceded by plaintiffs, that the D.C. Circuit may not, now, take jurisdiction over their

B.
1.

Subsection 402(b)(1) applies to licensing decisions of the Commission, specifically, appeals by "any applicant for a . . . station license, whose application is denied by the Commission."[12] It is undisputed in this case that, strictly speaking, plaintiffs are not appealing from any formal denial of their applications, for plaintiffs do not contend that their applications for the seven RSA licenses were actually denied—only that the relotteries by which the Commission was allegedly obligated to award those licenses were canceled. Plaintiffs' claims therefore do not fall within the literal language of subsection 402(b)(1). Nevertheless, in addition to the licensing decisions expressly enumerated

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claims because of their failure to timely appeal within the Commission from the dismissal of their applications by the Bureau. *Folden*, 56 Fed. Cl. at 57; *see supra*, note 5. For this reason, 28 U.S.C. § 1631 is not applicable because at the time plaintiffs filed suit in the Court of Federal Claims, the D.C. Circuit would not have had jurisdiction over their suit, as a result of their failure to timely appeal within the Commission. *See Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 198 (Fed. Cir. 1997) ("The federal transfer statute, 28 U.S.C. § 1631, provides that a court may transfer an action to another court if the transferor court lacks jurisdiction to hear the action *and the transferee court would have had jurisdiction*." (emphasis added)).

[12]Plaintiffs do not dispute the Court of Federal Claims' conclusions (i) that the term "station license" encompasses PCS licenses, *see Nextwave*, 254 F.3d at 140; and (ii) that PCS licenses include licenses for cellular telephone service, *see Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 175 (D.C. Cir. 1997). *Folden*, 56 Fed. Cl. at 56 & n.4; *see also Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1403 (D.C. Cir. 1996) (holding that the term "station license" in subsection 402(b) encompasses PCS licenses); *Nextwave*, 254 F.3d at 140 (citing, *inter alia* 47 U.S.C. §§ 153(42) (defining "station license" as "that instrument of authorization required . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio"), 153(33) (defining "communication by radio" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds")).

therein, subsection 402(b) also extends to licensing decisions of the Commission that are "ancillary" to those set forth in subsections (1)-(9). *See Tomah-Mauston Broad. Co. v. FCC*, 306 F.2d 811, 811-12 (D.C. Cir. 1962); *Cook*, 394 F.2d at 84-85. The applicability of subsection 402(b)(1) to plaintiffs' claims thus turns not on whether plaintiffs' claims fall within the literal statutory language, but whether their claims fall within the scope of Commission licensing decisions that are ancillary to those set forth in subsection 402(b). The question before us, then, is whether the Commission's failure to hold relotteries for the seven RSA licenses at issue is "ancillary" to the Commission's decision to deny an applicant a station license under subsection 402(b)(1).[13]

The Court of Federal Claims determined that subsection 402(b)(1) applied to plaintiffs' claims. *Folden*, 56 Fed. Cl. at 56-58. After reviewing the caselaw that extends subsection 402(b)(1) to Commission orders that are ancillary to an exercise of its licensing power under subsection 402(b), the court concluded, "Had the plaintiffs exhausted their administrative remedies, an appeal of the [Commission] decision would have been proper in the [D.C. Circuit], the court with statutory authority to review licensing decisions." *Id.* at 57.

On appeal, plaintiffs point to *Freeman Engineering Associates, Inc. v. FCC*, in which the D.C. Circuit determined that the Commission's dismissal of certain

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[13]Plaintiffs frame their challenge to the Commission's action in terms of a claim for breach of contract. We have already held, however, that if subsection 402(b) applies in this case, it preempts Tucker Act jurisdiction. In analyzing whether subsection 402(b) applies, we must look to the true nature of plaintiffs' claim, not how plaintiffs characterize it. At root, plaintiffs' action plainly represents a challenge to the Commission's failure to hold relotteries for the seven RSA licenses at issue. It is on those terms that we approach the question whether subsection 402(b) applies to it.

preference applications was neither a denial of a license nor a matter ancillary to the denial of a license, and that therefore the dismissal did not fall within the scope of subsection 402(b). 103 F.3d 169, 177-78 (D.C. Cir. 1997). Thus, plaintiffs argue that because no application for a license was formally granted or denied in the Commission's decision not to hold relotteries for the seven RSA licenses, and because, to use plaintiffs' words, "the dismissal orders were not ancillary to any [Commission] order granting or denying any license application," subsection 402(b)(1) does not encompass their claims.

In response, the government asserts that subsection 402(b)(1) does encompass plaintiffs' claims, thereby providing the D.C. Circuit with exclusive jurisdiction. The government refers us to *Cook*, 394 F.2d at 87, in which the Seventh Circuit held that orders returning the petitioner's untimely license application were ancillary to an exercise of the Commission's licensing power, and to *Kessler*, in which the D.C. Circuit held that it possessed exclusive jurisdiction to review a Commission order refusing to accept the appellants' license applications. 326 F.2d at 679 n.4. The government further cites, *inter alia, Tomah-Mauston*, 306 F.2d at 812, which ruled that a Commission order denying a petition to stay and revoke a construction permit was ancillary to the grant of a construction permit, and *Metropolitan Television Co. v. United States*, 221 F.2d 879 (D.C. Circuit 1955), which ruled that the D.C. Circuit possesses exclusive jurisdiction over orders denying protests and rehearing even though neither is specified in subsection 402(b).

2.

We agree with the Court of Federal Claims that subsection 402(b)(1) encompasses plaintiffs' claims. In our view, a Commission decision not to hold relotteries is

ancillary to the denial of a station license as set forth in subsection 402(b)(1).[14]

With regard to the substance of subsection 402(b), the Senate Report explained in 1951, "The language of this subsection [402(b)], when considered in relation to that of subsection (a), also would make it clear that judicial review of *all cases involving the exercise of the Commission's radio licensing power* is limited to that court [the D.C. Circuit]."

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[14] To the extent that plaintiffs contend that the Commission's failure to hold relotteries was not an appealable "decision" or "order" as set forth in subsection 402(b)(1), we disagree. We conclude that the Commission's decision was in fact an appealable order within the meaning of the statutory scheme. *In re FCC*, 217 F.3d 125, 141 n.10 (2d Cir. 2000). In *In re FCC*, the Second Circuit concluded that a Public Notice of Auction of certain PCS licenses constituted an appealable order of the Commission. *Id.* While admitting that the Commission had "issued no order formally announcing the cancellation of the Licenses," the court nevertheless determined that revocation of the licenses was made explicit in the filing before the bankruptcy court and "implicit in the Public Notice announcing the re-auction of the Licenses ... ." *Id.* The court thus concluded that "the FCC action in question is unmistakably regulatory in nature." *Id.* In addition, the court explained,

> The FCC's Notice announced that specified licenses—those formerly possessed by NextWave—were to be re-auctioned. It is easy to conclude that this "denies a right." *Illinois Citizens Comm. [for Broadcasting v. FCC]*, 515 F.2d [397,] 402 [(D.C. Cir. 1974)]. And if that decision is appealable, its regulatory nature requires that it be appealed in the court of appeals.

Id. Likewise, in this case, as seen above, the decision of the Commission not to hold relotteries was announced by public notice and subsequently explained in another public notice. At the same time, we have no difficulty concluding that the cancellation of the relotteries denied plaintiffs the ability to receive the licenses by lottery. Thus, we conclude that despite the absence of a formal "decision" or "order" by the Commission, the decision not to hold relotteries for the seven RSA licenses at issue constituted an appealable decision within the meaning of subsection 402(b).

S. Rep. No. 44, at 10 (emphasis added). Relying on this language, the D.C. Circuit ruled as early as 1962 that appeals of Commission orders that are "ancillary" to those explicitly set forth in subsection 402(b) also fall within the scope of the statutory requirement that the D.C. Circuit have exclusive jurisdiction. *Tomah-Mauston*, 306 F.2d at 811. The court in *Tomah-Mauston*, relied upon three previous cases: (i) *Metropolitan Television*, 221 F.2d 879, in which the D.C. Circuit treated orders denying protests of a decision changing the frequency and power of a broadcasting station and orders denying rehearing as reviewable under subsection 402(b), though neither is set forth in the statute; (ii) *Federal Broadcasting Sys., Inc. v. FCC*, 239 F.2d 941 (D.C. Cir. 1956), in which the court accepted jurisdiction pursuant to subsection 402(b)(6) over an appeal from the Commission's grant of a petition requesting that authorization for a television permit remain in effect pending protest proceedings of that authorization; and (iii) *Gerico Investment Co. v. FCC*, 240 F.2d 410, 411 n.1 (D.C. Cir. 1957), in which the court explained that ordinarily there is no question of the D.C. Circuit's jurisdiction pursuant to subsection 402(b)(1) over an appeal from the grant of a construction permit and "orders ancillary thereto." Armed with this precedent, the court in *Tomah-Mauston* determined that an appeal of a petition to stay and revoke a construction permit, while not expressly set forth in subsection 402(b), nevertheless fell within the exclusive jurisdiction of the D.C. Circuit. 306 F.2d at 811. Likewise, also relying on Senate Report No. 44, at 10, the Seventh Circuit adopted this position in *Cook*, holding that Commission orders returning an application and denying reconsideration of a return order are "ancillary" to the exercise of the Commission's "licensing power." 394 F.2d at 86-87.

Perhaps most analogous to plaintiffs' situation is *Kessler*. In that case, in a Report and Order issued on May 10, 1962, the Commission announced a "freeze" on the acceptance of applications for most classes of standard radio broadcast

stations, effective at the close of business that day. *Kessler*, 326 F.2d at 678. The Order explained that the Commission intended to "issue a notice of proposed rulemaking" related to the potential revision of its rules governing AM broadcast assignments. *Id.* Applicants had tendered their applications on or before June 15, 1962, after the freeze order was issued but before it was published, and the applications were returned by the Commission unfiled. *Id.* at 686 n.11. Applicants appealed the Commission's refusal to accept their applications. The D.C. Circuit held that the Commission's refusal to accept the applications fell within the ambit of subsection 402(b)(1) because, as the government argued and the applicants did not dispute, the freeze order "in effect denie[d] their applications . . . ." *Id.* at 679 n.4. Thus, the court exercised its jurisdiction pursuant to subsection 402(b)(1). *Id.*

From these cases, we conclude that the Commission's decision not to hold relotteries on September 18, 1996, for six of the RSA licenses, and its failure to hold a relottery for the Tex. 21 RSA license by April 17, 1997, constituted actions ancillary to the licensing power of the Commission, specifically to the denial of a station license set forth in subsection 402(b)(1).[15] We think that the Commission's

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[15]The examples of Commission decisions not falling within the scope of 402(b), to which plaintiffs analogize their situation, are not persuasive. *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976), did not involve a decision by the Commission related to licensing, but rather an entirely unrelated ruling as to whether certain remarks on a radio program fell within the scope of the personal attack rule. *Campos v. FCC*, 650 F.2d 890 (7th Cir. 1981), involved petitions to review Commission orders denying *operator licenses*, not station licenses, and the court correctly found that it therefore possessed jurisdiction pursuant to subsection 402(a). In *Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005 (D.C. Cir. 2001), the court ruled that a challenge to the Commission's decision to change the status of two television channels did not fall within the scope of subsection 402(b), because the case did not involve any decision by the Commission related to licensing, only the change in status of an existing license.

failure to hold relotteries when plaintiffs had already filed their lottery applications is just as ancillary to subsection 402(b) as the Commission decisions set forth in the cases above. For example, in *Kessler*, the applicants had not even filed their applications; yet, the court held that the Commission's refusal to accept their applications was ancillary to the denial of a license. Plaintiffs' claims here are even more closely related to the decisions listed in subsection 402(b)(1): they had filed their applications for the seven RSA licenses some eight years earlier; thus, by failing to hold the relotteries, the Commission necessarily determined that plaintiffs' lottery applications would not result in their receiving licenses. Rather than, as the court characterized it in *Kessler*, "in effect" denying their applications, the Commission here "in fact" denied plaintiffs' lottery applications, albeit without issuing a formal order.

Finally, plaintiffs rely upon *Freeman Engineering* and *Waterway Communications Sys., Inc. v. FCC*, 851 F.2d 401 (D.C. Cir. 1988). Neither case helps plaintiffs, however. In *Freeman Engineering*, the Commission had dismissed the appellants' applications for "pioneer's preferences,"[16] not applications for the licenses themselves. 103 F.3d 169. The appellants sought to challenge the action in the D.C. Circuit, which rejected the attempt. The court explained that

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[16]The rules for pioneer's preferences provide that if an applicant demonstrates that it "has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service," the applicant may receive a pioneer's preference when the Commssion adopts rules governing the new or enhanced service. *Freeman Eng'g*, 103 F.3d at 174 (quoting 47 U.S.C. § 1.402(a)). "A preference 'effectively guarantees the innovating party a license in the new service (assuming it is otherwise qualified) by permitting the recipient of a pioneer's preference to file a license application without being subject to competing applications.'" *Id.* (quoting *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 F.C.C.R. 3488, 3492 (1991)).

subsection 402(b) did not apply because the "Commission does not grant licenses at the time a pioneer's preference is awarded. Nor does the grant of a preference irrevocably commit the Commission to grant a license." *Id.* at 174 (citing *Waterway Communications*, 851 F.2d at 405). In contrast, plaintiffs' lottery applications in this case *were* denied, along with any chance to receive a license by lottery, when the Commission decided not to hold relotteries. In other words, once the Commission failed to hold relotteries, plaintiffs could not be awarded any of the RSA licenses on the basis of their lottery applications.

Waterway Communications also is distinguishable from this case. Waterway Communications System, Inc. ("Watercom") petitioned the Commission to deny the pending applications for certain licenses filed by its competitor, Radio Television of Louisiana, Inc. ("RTL"). *Waterway Communications*, 851 F.2d at 402. The Commission rejected Watercom's petition to deny, and its subsequent petition for reconsideration of the Commission's rejection of its petition, and directed that RTL's applications be processed in the ordinary course of business. *Id.* at 403. Watercom attempted to appeal to the D.C. Circuit the Commission's order denying its petition to deny RTL's applications. The court, however, dismissed its appeal. Explaining that subsection 402(b), on its face, "requires as a trigger the grant or denial of a license application," the court concluded that the Commission's order neither was a final license grant, nor irrevocably committed the Commission to grant RTL the licenses. *Id.* Thus, according to the court, the order was not appealable pursuant to subsection 402(b). *Id.* at 403-04. Again, plaintiffs' case is distinguishable; their license applications were denied when the Commission failed to hold relotteries.

In sum, we conclude that the Commission's failure to hold relotteries for the seven RSA licenses at issue was an action ancillary to the denial of an application for a station

license, as set forth in subsection 402(b)(1). Therefore, subsection 402(b) provided for jurisdiction in the D.C. Circuit over plaintiffs' claims had there been exhaustion of administrative remedies.

CONCLUSION

Plaintiffs' amended complaint seeks judicial review of the Commission's decision not to hold relotteries for the seven RSA licenses at issue. Such a decision by the Commission is ancillary to the denial of a license application, as set forth in 47 U.S.C. § 402(b)(1). For these reasons, plaintiffs' claims are subject to the exclusive jurisdiction of the D.C. Circuit. We therefore affirm the Court of Federal Claims' dismissal of plaintiffs' suit for lack of subject-matter jurisdiction.

AFFIRMED

APPENDIX B

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc, and the same hereby is, DENIED.

The mandate of the court will issue on November 26, 2004.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: November 18, 2004

cc: Russell D. Lukas
Paticia M. McCarthy

FOLDEN V US, 03-5124
(CFC – 01-cv-456)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX C

In the United States Court of Federal Claims

No. 01-456C
Filed: March 28, 2003

* *

GENE A. FOLDEN, COASTAL COMMUNICATIONS ASSOCIATES, and JUDITH A. LONGSHORE,
Plaintiffs,

v.

UNITED STATES,
Defendant.

* *

ROBERT G. KERRIGAN, GEORGE W. ESTESS, Kerrigan, Estess, Rankin & McLeod, LLP, Pensacola, Florida, for the plaintiffs. RUSSELL D. LUKAS, GEORGE L. LYON, JR., Lukas, Nace, Gutierrez & Sachs, Chartered, of counsel.

PATRICIA M. McCARTHY, Commercial Litigation Branch, Civil Division; DAVID M. COHEN, Director; ROBERT D. McCALLUM, JR., Assistant Attorney General, United States Department of Justice, for the defendant. ROBERTA L. COOK, Office of the General Counsel, SUSAN L. LAUNER, Deputy Associate General Counsel, Federal Communications Commission, of counsel.

OPINION

HORN, J.

Plaintiffs, Gene A. Folden, Coastal Communications Associates and Judith A Longshore, have filed a complaint against the United States, based on actions taken by the Federal Communications Commission (FCC). Plaintiffs allege that the FCC breached implied-in-fact contracts with plaintiffs to award seven cellular licenses by lottery, and also violated the Takings Clause of the Fifth Amendment to the Constitution by abrogating plaintiffs' contract rights without compensation. Plaintiffs together seek an aggregate amount of $144,088,000.00, divided on the basis of the fair market value of the individual licenses, as well as interest and attorneys' fees. The defendant filed a motion to dismiss for lack of jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted.

FINDINGS OF FACT

According to the complaint, for the purposes of issuing cellular licenses, the FCC divided the United States into two types of geographic markets, metropolitan statistical areas and rural service areas (RSAs). In each market, the FCC granted two competing licenses, one to the "wireline" operator, an established local telephone company, and the other license to a "non-wireline" operator, any party other than an established local telephone company. This case involves the awarding of cellular licenses in seven RSA markets to non-wireline operators.

Pursuant to the Communications Amendments Act of 1982, the FCC was authorized to employ a random selection process to select licenses for certain communications services it regulated. *See* 47 U.S.C. § 309(i) (1982). In 1984, the FCC adopted rules to grant cellular licenses by random selection, or lottery. 47 C.F.R. §§ 1.821, 22.33 *et seq.* (1984); *see also In re Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 F.C.C.2d

175, 175, 1984 WL 251081 (1984). According to the rules in place in 1988, the year the events in this case commenced, an applicant that was selected through the lottery process was deemed a "tentative selectee." 47 C.F.R. § 1.823(a) (1988). Selection in the lottery did not necessarily ensure the grant of a license. Before awarding the licenses, the FCC reviewed the tentative selectee's application to ensure qualification under the agency's cellular application rules. 47 C.F.R. §§ 1.822(a), 1.823(a) (1988).

In 1988, each of the plaintiffs submitted applications to the FCC for cellular licenses in certain RSAs, along with a $200.00 filing fee. Gene A. Folden applied for a cellular license in the Florida 11-Monroe (Fla. 11) RSA and submitted a $200.00 filing fee. Coastal Communications Associates (Coastal) applied for cellular licenses in the following seven RSAs: North Dakota 3-Barnes (N.D. 3); Minnesota 11-Goodhue (Minn. 11); Texas 21-Chambers (Tex. 21); Arkansas 9-Polk (Ark. 9); Puerto Rico 5-Ceiba (P.R. 5); Pennsylvania 4-Bradford (Pa. 4); and Fla. 11. Coastal paid $1,400.00 in application filing fees. Finally, Michael D. Longshore, the deceased husband of plaintiff, Judith A. Longshore, applied for licenses in the following four RSAs: N.D. 3; Minn. 11; Tex. 21; and Pa. 4. Mr. Longshore paid $800.00 in application filing fees.

The cellular license lotteries were held in 1989. Tentative selectees, none of whom were the plaintiffs, were chosen for the seven RSA markets at issue. Subsequently, however, these initial, tentative selectees were disqualified for a variety of reasons, including findings of ineligibility to be licensees. Therefore, the licenses were not awarded to any of the original seven tentative selectees, and their applications were ultimately dismissed.

The procedure to be followed upon disqualification of a tentative selectee was modified in 1988. Before May, 1988, the rule in effect stated that after the selection of a tentative

selectee, alternates were selected from the remaining applicant pool:

> The random selection shall pick a tentative selectee and then repeat the random selection process with the remaining applicants, so that, in the event that the tentative selectee's application is denied, the other applicants will be ranked in order as alternative selectees. ... If the tentative selectee is disqualified, or its application designated for hearing, the Commission will allow Petitions to Deny against the next-ranked tentative selectee.

47 C.F.R. § 1.823(a)-(b)(2) (1988). This rule was modified, effective May 18, 1988, to give the Common Carrier Bureau Chief and its Managing Director the authority to determine the number of alternatives to be selected, if any, on a case-by-case basis. *See* 47 C.F.R. § 1.823(a) (1989); *see also Amendment of Section of Part 1 of the Commission's Rules as They Apply to Applications to be Included in Public Land Mobile and Cellular Lotteries*, 53 Fed. Reg. 52,425 (Dec. 28, 1988). The modified, May 18, 1988, rule stated in pertinent part:

> The designated Lottery Official shall select the winning applicant from among mutually exclusive applicants. The Lottery Official may select in rank order a number of additional applicants. The number of additional applicants selected will be determined by the Chief of the Common Carrier Bureau and the Managing Director. ... If the tentative selectee is disqualified, or its application designated for hearing, the Commission will allow Petitions to Deny against the next-ranked tentative selectee.

47 C.F.R. § 1.823(a)-(b)(2) (1989).

In the present case, only one applicant, the tentative selectee, was chosen from each of the seven lotteries at issue; no alternates were chosen. None of the plaintiffs were tentative selectees. When the FCC announced the scheduling of the initial lotteries, the FCC issued lottery notices, which indicated that re-lotteries would be held if the tentative selectees were disqualified. The re-lotteries were to be held among the applications on file, excluding the dismissed applications. The notices read: "In the event that the application selected cannot be granted, another lottery will be held for that market and another application will be selected from the remaining applications." On April 8, 1992, the FCC held re-lotteries, including a re-lottery for one of the seven licenses at issue, the Tex. 21 license. *In re Cellular Rural Serv. Area Applications in Mkt. Nos. 599A and 672A*, DA 99-1426 (July 21, 1999). The tentative selectee in the Tex. 21 re-lottery was Alee Cellular Communications (Alee). Petitions to deny the license were filed against Alee's applications. Therefore, Alee's application was considered "pending." Alee was subsequently disqualified as an applicant.[1]

On August 10, 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993, which added section 309(j) to the Communications Act of 1934. Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-92 (1993) (codified at 47 U.S.C. § 309(j) (1994)). Section 309(j) gave

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[1]On November 1, 2002, an FCC Administrative Law Judge dismissed Alee's application for the Tex. 21 license. *In re Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular Sys. In Texas RSA 21 Market 672A*, WT Docket No. 02-28, File No. 11025-CL-P-672-A-89 (Nov. 1, 2002). Alee did not file a notice of appeal. All parties in the present case acknowledge that if Alee's application had been granted, the plaintiffs' claim as to that license would be moot.

the FCC express authority to employ competitive bidding procedures, or auctions, to choose among mutually exclusive applications for initial licenses. 47 U.S.C. § 309(j) (1994). On March 8, 1994, the FCC adopted rules implementing the auction provisions of the 1993 Budget Act. 47 C.F.R. §§ 1.2102 *et seq.* (1994); *see also In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 F.C.C.R. 2348 (1994).

Pertinent to the case before the court, section 6002(e) of the Omnibus Budget Reconciliation Act of 1993, titled "Special Rule," stated that: "[t]he Federal Communications Commission shall not issue any license or permit pursuant to section 309(i) of the Communications Act of 1934 (47 U.S.C. 309(i)) after the date of enactment of this Act unless ... one or more applications for such license were accepted for filing by the Commission before July 26, 1993." Pub. L. No. 103-66, Title VI, § 6002(e), 107 Stat. 312, 397 (1993) (codified at 47 U.S.C. § 309 note (1994)). This special provision gave the FCC discretion to determine whether to employ auctions or lotteries for applications filed prior to July 26, 1993. Pursuant to this statutory provision, on May 27, 1994, the FCC decided to employ lotteries, in lieu of auctions, to resolve pending mutually exclusive applications for cellular unserved areas filed prior to July 26, 1993. *Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, 59 Fed. Reg. 37,163 (July 21, 1994).

On August 2, 1994, the FCC revised its cellular licensing rules. *In re Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services; Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Service; Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band*

in the Public Land Mobile Service, 9 F.C.C.R. 6513 (1994). The new 47 C.F.R. § 22.959 provided that:

> Pending applications for authority to operate the first cellular system on a channel block in an MSA or RSA market continue to be processed under the rules governing the processing of such applications that were in effect when those applications were filed, unless the Commission determines otherwise in a particular case.

47 C.F.R. § 22.959 (1995). In the present case, the governing rule at the time the plaintiffs' applications were filed was the 1988 rule, 47 C.F.R. § 22.33, which provided for the use of lotteries to distribute cellular licenses.

On July 12, 1996, the FCC announced that it would hold re-lotteries on September 18, 1996 for the six remaining markets at issue. The FCC also stated that additional re-lotteries would be held if any of the applications selected on September 18, 1996 could not be granted licenses.

On September 9, 1996, Cellular Communications of Puerto Rico (CCPR) filed an *ex parte* petition requesting the FCC to issue a declaratory ruling that an auction, in lieu of a lottery, would be used to award the cellular license for the P.R. 5 market. *Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling, or, in the Alternative, for Rulemaking*, RM-8897 (filed Sept. 9, 1996). Alternatively, CCPR requested that the FCC initiate a rulemaking proceeding to determine whether an auction should be held, in lieu of a lottery, for this market.

On September 10, 1996, the Chief of the Commercial Wireless Division issued a public notice, stating that the re-lotteries for the six markets previously scheduled for September 18, 1996 were postponed. FCC Public Notice,

Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas, Mimeo No. 65051 (Sept. 10, 1996). No explanation was given at that time. On October 24, 1996, the FCC stated that CCPR's petition "raises issues concerning the broader applicability of the use of competitive bidding to award cellular licenses for RSAs for which applications were filed prior to July 26, 1993, where the original tentative selectee has been disqualified and no license has been awarded to date." FCC Public Notice, *Public Comment Invited, Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should be Used to License Certain Cellular Rural Service Areas*, RM-8897 (Oct. 24, 1996). The FCC decided to treat CCPR's petition as a petition for rulemaking and requested comments on awarding cellular licenses through competitive bidding for all remaining unlicensed RSAs. *Id.*

On August 5, 1997, Congress passed the Balanced Budget Act of 1997 (1997 Budget Act), which repealed Section 6002(e) of the 1993 Budget Act and terminated the FCC's authority to award licenses via lotteries, even in the case of applications filed prior to July 26, 1993, except for licenses for noncommercial educational and public broadcast stations. Pub. L. No. 105-33, § 3002(a)(4), § 3002(a)(2)(B), 111 Stat. 251, 258, 260 (1997) (codified at 47 U.S.C. § (309)(i)(5) (2000)). Section 309(i)(5) states: "Except as provided in subparagraph (B), the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997." Given the termination of the FCC's remaining lottery authority, on April 2, 1999, the Wireless Telecommunications Bureau (WTB) dismissed all pending cellular lottery applications in the following six RSAs: N.D 3; Minn. 11; Ark. 9; Fla. 11; P.R. 5; and Pa. 4. *In re Certain Cellular RSA Applications*, 14 F.C.C.R. 4619 (1999). In addition, the WTB determined that the plaintiffs were not entitled to a refund of their

$200.00 filing fees because they had participated in the initial lotteries for those six RSAs. *Id.* Similarly, on April 29, 1999, the Cable Wireless Division, employing the same rationale, dismissed the plaintiffs' applications for Tex. 21 and denied a filing fee refund. *In re Certain Cellular RSA Applications in Market Nos. 599A and 672A*, DA 99-814 (Apr. 29, 1999).

On December 21, 2000, Congress passed the Launching Our Communities' Access to Local Television Act of 2000 (Local TV Act), Pub. L. No. 106-533, Title X, § 1007, 114 Stat. 2762A-128, 2762A-138 (2000), which mandated that the FCC reinstate the original tentative selectees for three of the seven RSAs at issue (Great Western for Minn. 11; Monroe Telephone Services L.P. (Monroe) (formerly Cellwave) for Fla. 11; and FutureWave for Pa. 4). The United States Court of Appeals for the District of Columbia Circuit had previously affirmed the FCC's decision to dismiss these three applications. *See Cellwave Tel. Servs. L.P. v. FCC*, 30 F .3d 1533 (D.C. Cir. 1994); *Great Western Cellular Parnters v. FCC*, 72 F .3d 919 (D.C. Cir. 1995) (table). On March 16, 2001, in compliance with the Local TV Act, the FCC announced the granting of licenses to Monroe for Fla. 11; Great Western for Minn. 11; and FutureWave for Pa. 4. FCC Public Notice, *Wireless Telecommunications Bureau Grants Rural Cellular Licenses*, 16 F.C.C.R. 5601 (2001).

On January 13, 2001, the FCC proposed rules under which it would auction licenses in the following four RSA markets: Ark. 9; N.D. 3; Tex. 21; and P.R. 5. *In re Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 16 F.C.C.R. 4296 (2001). On January 16, 2002, the FCC adopted rules to govern the conduct of auctions to award licenses in RSA markets in which no tentative selectee had been selected by a second lottery conducted prior to July 1, 1997, and in which Congress had not directed the FCC to reinstate an original

tentative selectee. 47 C.F.R. §§ 22.228, 22.969 (2002); *see also In re Implementation of Competitive Bidding Rules to License Certain Rural Service Areas*, 17 F.C.C.R. 1960 (2002). As a result, the Commission adopted auction rules for four of the seven RSA markets at issue in the present case: Tex. 21; N.D. 3; P.R. 5; and Ark. 9. 47 C.F.R. §§ 22.228, 22.969.

The plaintiffs in the present case have not sought reconsideration or review of the dismissal of their applications at the FCC. Plaintiffs filed a class action complaint in this court, and, subsequently, filed an amended class action complaint. Plaintiffs also filed a motion seeking to certify a purported class consisting of all applicants whose applications had been accepted for filing by the FCC for cellular licenses in the seven RSAs in 1988, excluding those applicants that became tentative selectees, but were disqualified by the FCC. The defendant filed a motion to dismiss. Defendant also filed a motion to stay consideration of plaintiffs' class certification request pending the court's resolution of its pending motion to dismiss, which the court granted.

DISCUSSION

Subject matter jurisdiction may be challenged at any time by the parties, by the court sua sponte, even on appeal. *Fanning, Phillips, Molnar v. West*, 160 F .3d 717, 720 (Fed. Cir. 1998) (quoting *Booth v. United States*, 990 F .2d 617, 620 (Fed. Cir.), *reh'g denied* (1993)); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F .2d 996, 998 n.1 (Fed. Cir. 1991). Once jurisdiction is challenged by the court or the opposing party, the plaintiff bears the burden of establishing jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998); *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1324 (Fed. Cir. 1997); *Rocovich v. United States*, 933 F.2d 991,

993 (Fed. Cir. 1991); *Bowen v. United States*, 49 Fed. Cl. 673, 675 (2001) (noting that the plaintiff bears the burden of proof on a motion to dismiss for lack of jurisdiction), *aff'd*, 292 F.3d 1383 (Fed. Cir. 2002); *Schweiger Constr. Co. v. United States*, 49 Fed. Cl. 188, 205 (2001); *Catellus Dev. Corp. v. United States*, 31 Fed. Cl. 399, 404 (1994). A plaintiff must establish jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Martinez v. United States*, 48 Fed. Cl. 851, 857 (2001), *aff'd in part*, 281 F.3d 1376 (Fed. Cir.), *reh'g denied* (2002); *Bowen v. United States*, 49 Fed. Cl. at 675; *Vanalco, Inc. v. United States*, 48 Fed. Cl. 68, 73 (2000); *Alaska v. United States*, 32 Fed. Cl. 689, 695 (1995), *appeal dismissed*, 86 F.3d 1178 (Fed. Cir. 1996) (table). When construing the pleadings pursuant to a motion to dismiss, the court should grant the motion only if "it appears beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 654 (1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 46 (1957)); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir.), *reh'g and reh'g en banc denied* (2002), *petition for cert. filed*, 71 U.S.L.W. 3505 (U.S. Jan. 21, 2003); *Conti v. United States*, 291 F.3d 1334, 1338 (Fed. Cir. 2002), *cert. denied*, 123 S.Ct. 904, 154 L.Ed.2d 785 (2003); *Consolidated Edison Co. v. O'Leary*, 117 F.3d 538, 542 (Fed. Cir. 1997), *cert. denied sub nom. Consolidated Edison Co. v. Pena*, 522 U.S. 1108 (1998); *see also New Valley Corp. v. United States*, 119 F.3d 1576, 1579 (Fed. Cir.), *reh'g denied, en banc suggestion declined* (1997); *Highland Falls-Fort Montgomery Cent. School Dist. v. United States*, 48 F.3d 1166, 1169 (Fed. Cir.), *cert. denied*, 516 U.S. 820 (1995); *Hamlet v. United States*, 873 F.2d 1362, 1364 (Fed. Cir. 1988) ("When the facts alleged in the complaint reveal 'any possible basis on which the non-movant might prevail, the motion must be denied.'"); *RCS Enters., Inc. v. United States*, 46 Fed. Cl. 509, 513 (2000).

Pursuant to Rule 8(a)(1) of the Rules of the Court of Federal Claims (RCFC) and Rule 8(a)(1) of the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." RCFC 8(a)(1). However, "[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir.), *reh'g denied* (1997) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983)). "[C]onclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983); *see also Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

When deciding on a motion to dismiss based on lack of subject matter jurisdiction, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. at 45-46; *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002), *cert. denied*, No. 02-862, 2003 WL 892145 (U.S. Mar. 10, 2003); *Pixton v. B&B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002); *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998); *Highland Falls-Fort Montgomery Cent. School Dist. v. United States*, 48 F.3d at 1667 (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Hamlet v. United States*, 873 F.2d at 1416; *Ho v. United States*, 49 Fed. Cl. 96, 100 (2001), *aff'd*, 30 Fed. Appx. 964 (Fed. Cir. 2002); *Alaska v. United States*, 32 Fed. Cl. at 695. If a defendant or the court challenges jurisdiction or plaintiff's

claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. at 189; *see also Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d at 747; *Catellus Dev. Corp. v. United States*, 31 Fed. Cl. at 404-05. When considering a motion to dismiss for lack of subject matter jurisdiction, the court may examine relevant evidence in order to resolve any factual disputes. *See Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d at 747; *see also Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) ("In establishing predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits and deposition testimony."), *cert. denied*, 512 U.S. 1235 (1994); *Vanalco v. United States*, 48 Fed. Cl. at 73 ("If the truth of the alleged jurisdictional facts is challenged in a motion to dismiss, the court may consider relevant evidence to resolve the factual dispute.").

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C. § 1491 (2000). The Tucker Act states:

> The United States Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States; (2) for a refund from a prior payment made to the government; or (3) based on federal constitutional, or statutory, or regulatory law mandating compensation by the federal government for damages sustained. *See United States v. Testan*, 424 U.S. 392, 400, *reh'g denied*, 425 U.S. 957 (1976) (citing *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1009 (1967)); *see also Palmer v. United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999); *Stinson, Lyons & Bustamante, P.A. v. United States*, 33 Fed. Cl. 474, 478 (1995), *aff'd*, 79 F.3d 136 (Fed. Cir. 1996). A waiver of traditional sovereign immunity cannot be implied but must be "unequivocally expressed." *INS v. St. Cyr*, 533 U.S. 289, 299 n.10 (2001); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1372 (Fed. Cir.), *reh'g and reh'g en banc denied* (2001); *Saraco v. United States*, 61 F.3d 863, 864 (Fed. Cir. 1995) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)), *cert. denied*, 517 U.S. 1166 (1996).

The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims, "'It does not create any substantive right enforceable against the United States for money damages.'" *United States v. Mitchell*, 445 U.S. 535, 538 (quoting *United States v. Testan*, 424 U.S. at 398-99), *reh'g denied*, 446 U.S. 992 (1980); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1372 (Fed. Cir. 2001), *aff'd*, 123 S.Ct. 1126 (2003); *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001); *New York Life Ins. Co. v. United States*, 118 F.3d 1553, 1555-56 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1065 (1984). Individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of

sovereign immunity. *United States v. Mitchell*, 445 U.S. at 538. In order for a claim to be successful, the plaintiff "must also demonstrate that the source of law relied upon 'can fairly be interpreted as mandating compensation by the federal government for the damages sustained.'" *White Mountain Apache Tribe v. United States*, 249 F.3d at 1372 (quoting *United States v. Mitchell*, 463 U.S. 207, 216-17 (1983)); *United States v. Testan*, 424 U.S. at 400; *Tippett v. United States*, 165 F.3d 1250, 1254 (Fed. Cir. 1999) ("[T]he plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.") (quoting *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998), *reh'g denied* (1999)); *Doe v. United States*, 100 F.3d 1576, 1579 (Fed. Cir. 1996) *reh'g denied, en banc suggestion declined* (1997); *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. at 607, 372 F.2d at 1009.

In the present case, the plaintiffs claim that the government breached an implied-in-fact contract, formed when the plaintiffs filed lottery applications and submitted the requisite fees, by failing to hold re-lotteries to award the cellular licenses at issue. In addition, the plaintiffs assert that the FCC's decision to cancel the lotteries, and the revocation of the FCC's authority to award licenses via lotteries by Congress, violated the Takings Clause of the Fifth Amendment in that the government allegedly took the plaintiffs' contract rights without paying just compensation.

With respect to the Fla. 11; Minn. 11; and Pa. 4 RSA cellular markets, the plaintiffs also make two, additional takings arguments that relate to the Local TV Act of 2000. This argument is based on decisions by the FCC, affirmed by the United States Court of Appeals for the District of Columbia. The Local TV Act of 2000 directed the FCC to reinstate three tentative selectees that had been disqualified by the FCC, with the disqualification having been upheld in the United States Court of Appeals for the District of

Columbia. Therefore, the plaintiffs maintain that the Local TV Act of 2000 unconstitutionally appropriated, or was a taking of, their alleged contractual rights. The plaintiffs also argue that the Local TV Act of 2000 constitutes an uncompensated taking of the plaintiffs' contract rights regarding Fla. 11; Minn. 11; and Pa. 4 RSA cellular markets, in yet another manner. The Local TV Act of 2000 directed the FCC to charge the previously disqualified tentative selectees license fees, which the plaintiffs maintain were less than the fair market value of the licenses, thereby conferring a private benefit on those tentative selectees.

In response to plaintiffs' complaint, the defendant filed a motion to dismiss the complaint for lack of subject matter jurisdiction. According to the defendant, although the complaint nominally seeks money damages, it effectively requests the court to review the FCC's licensing orders, a matter that is exclusively assigned by statute to the United States Court of Appeals for the District of Columbia Circuit. Alternatively, the defendant requested that the complaint be dismissed for failure to state a claim upon which relief can be granted.

I. Implied-in-Fact Contract Claim

Plaintiffs have alleged an implied-in-fact contract in the Court of Federal Claims under the Tucker Act. The Tucker Act of 1887 grants the Court of Federal Claims jurisdiction over, *inter alia*, "[a]ny claim against the United States founded ... upon any express or implied contract with the United States ...." 28 U.S.C. § 1491(a)(1) (2000). In the 1952 Amendments to the Communications Act of 1934, Congress provided for, *inter alia*, the redress of denials of cellular license applications by the FCC. *See* Act of July 16, 1952, 66 Stat. 718 (codified at 47 U.S.C. § 402(b)(1)).

Section 402(b)(1)[2] provides that: "Appeals may be taken from decisions and orders of the Commission to the United Court of Appeals for the District of Columbia in any of the following cases: (1) By any applicant for a construction permit or station license, whose application is denied by the Commission." Although plaintiffs characterize their case as a contract action, defendant argues that the plaintiffs are actually seeking review of the orders dismissing the plaintiffs' cellular applications by the Wireless Telecommunications Bureau, which should be contested pursuant to the provisions of 47 U.S.C. § 402(b). Therefore, the issue before the court regarding jurisdiction is whether plaintiffs must bring their case before the FCC and then the District of Columbia Circuit Court of Appeals, or may bring their causes of action to this court pursuant to the Tucker Act.

"It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986) (citations omitted); *see also Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1370 (Fed. Cir. 2002); *State of California v. United States*, 271 F.3d 1377, 1382 (Fed. Cir. 2001). Furthermore, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (citations omitted). Repeals by implication are countenanced only when the two statutes are

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[2]Throughout the proceedings, defendant asserted jurisdiction in the United States Court of Appeals for the District of Columbia Circuit, pursuant to section 402(b) in general. During oral argument, however, defendant's counsel referred to section 402(b)(6), which is inapplicable to the plaintiffs before the court. It is section 402(b)(1) which refers to appeals from decisions and orders of the Commission by "any applicant" of license denials. Section 402(b)(6) refers to appeals from decisions and orders of the Commission by "any other person who is aggrieved or whose interests are adversely affected." *See also Waterway Communications Systems, Inc. v. FCC*, 851 F .2d 401 (1988).

irreconcilable. *See Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir.), *reh'g denied* (2000) (citing *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). Under this stringent test, it can be argued that the 1952 Amendments to the Communications Act of 1934 did not impliedly repeal the Tucker Act of 1887. Clearly, the plaintiffs, in their search for a remedy, could have proceeded down the road Congress paved for them in 47 U.S.C. § 402(b), a road which leads to the District of Columbia Circuit Court of Appeals. In addition, this court would not be divested of jurisdiction under the Tucker Act, so long as the plaintiffs' alleged implied-in-fact contract claims are non-frivolous. *See Hanlin v. United States*, 214 F.3d at 1321-22.

Assuming, for the sake of argument, that this court has jurisdiction to entertain plaintiffs' implied-in-fact contracts, and because certain case precedent suggests that almost any implied-in-fact allegation gives this court jurisdiction to review such claims, the court will review plaintiffs' claim in this regard. As discussed below, however, the court believes that, logically, plaintiffs' complaint, based on FCC decisions to dismiss plaintiffs' applications, should be reviewed in the United States Court of Appeals for the District of Columbia and not in this court.

An implied-in-fact contract is an agreement "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances their tacit understanding." *Trauma Serv. Group v. United States*, 104 F.3d at 1326 (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996)) (quoting *Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923)); *see also Bay View, Inc. v. United States*, 278 F.3d 1259, 1265-66 (Fed. Cir. 2001) (citing *Trauma Service Group v. United States*, 104 F.3d at 1326), *reh'g and reh'g en banc denied*, 285 F.3d 1035 (Fed. Cir.), *cert. denied*, 123 S. Ct. 114, 154 L. Ed. 2d 37 (2002). The Federal Circuit, in

the *Barrett Refining* case, restated the elements of an implied-in-fact contract as mutuality of intent to contract; consideration; lack of ambiguity in offer and acceptance; and authority to bind the government. *Barrett Refining Corp. v. United States,* 242 F.3d 1055, 1060 (Fed. Cir.), *reh'g denied* (2001). "In short, an implied-in-fact contract arises when an express offer and acceptance are missing but the parties' conduct indicates mutual assent." *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (citing *Chavez v. United States*, 18 Cl. Ct. 540, 544 (1989)).

In the present case, the plaintiffs allege that they entered into an implied-in-fact contract with the FCC, such that the FCC was contractually bound to hold re-lotteries for cellular licenses. More specifically, plaintiffs state that:

> [T]the FCC made a public offer that applicants would have chances of winning RSA licenses in lotteries. Acceptance of that offer was conditioned on the applicants properly filing applications and paying $200 in fees to the FCC in accordance with its lottery rules and procedures. Under contract law, by filing applications and paying the fees as the FCC required in 1988, plaintiffs accepted the FCC's offer, agreed to the FCC's lottery rules and procedures, and formed binding contracts with the FCC. Plaintiffs provided consideration by entering the lotteries and complying with the FCC's lottery rules and procedures.
>
> The terms of the contracts between the FCC and plaintiffs were set out in the FCC's lottery rules and the procedures announced to the public in its lottery notices. One of the terms of the contracts was set prior to the first "non-wireline" lottery, when the FCC's

> Common Carrier Bureau ("CCB") issued a "lottery notice" that included the statement: "In the event that the application selected cannot be granted, another lottery will be held for that market and another application will be selected from the remaining applications." An identical statement was included in each of the seven lottery notices the CCB issued before the lotteries for the Seven Licenses. The public announcement that re-lotteries would be held contractually bound the FCC, as the lottery-promoter, to hold re-lotteries that would include plaintiffs if the applications originally selected for the Seven Licenses could not be granted.
>
> Under the common law of lotteries, the facts plaintiffs allege complete the normal offer-acceptance-consideration equation for the formation of enforceable contracts. Because the FCC never conducted the promised re-lotteries to award the Seven Licenses, plaintiffs state a cause of action for breach of implied lottery contracts.

The first element of an implied-in-fact contract is mutuality of intent to contract. The United States Supreme Court in *Baltimore & Ohio Railroad v. United States* stated that "an agreement will not be implied unless the meeting of minds was indicated by some intelligible conduct, act or sign." *Baltimore & Ohio R.R. v. United States*, 261 U.S. at 598; *see also Russell v. United States*, 182 U.S. 516, 530 (1901) ("[T]o give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties -- 'a coming together of minds.'") (quoted in *Hercules, Inc. v. United States*, 516 U.S. at 424); *Barrett Refining Corp. v. United States*, 242 F.3d at 1059-60; *Atlas*

Corp. v. United States, 895 F.2d 745, 754 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990).

The defendant contends that this first element of an implied-in-fact contract cannot be established in the case before this court. More specifically, defendant contends that "[p]laintiffs neither allege nor establish that the parties mutually intended to enter into binding unconditional contracts to use a random selection process to award licenses in the seven RSA markets at issue." According to the defendant, "[t]the FCC's simple receipt of plaintiffs' license applications did not create contracts." Moreover, the lottery notices and the FCC regulations upon which the plaintiffs base their contract claim, do not indicate an intent upon the part of the FCC to be contractually bound to hold re-lotteries to distribute the cellular licenses at issue. Furthermore, since the FCC's rules can be modified pursuant to proper rulemaking proceedings, or by actions of Congress, the FCC could not have intended to enter into a contract with the plaintiffs to hold re-lotteries, regardless of changes in the rules and the law.

The plaintiffs allege that: "The FCC's promissory words were published in §§ 1.823 and 22.33 of its rules and in a series of lottery notices issued between August 18, 1988 and July 12, 1996." The plaintiffs maintain that it is through these rules and notices that the FCC became contractually bound to hold re-lotteries for the licenses at issue.

The two rules to which the plaintiffs point do not specifically mention the use of re-lotteries, but do indicate that lotteries were to be employed to select holders of cellular licenses. The rule at 47 C.F.R. § 1.823(a) (1989) stated that: "If there are mutually exclusive applications for an initial license, the Commission may use a random selection process.... The designated Lottery Official shall select the winning applicant from among mutually exclusive applicants. The Lottery Official may select in rank order a

number of additional applicants." 47 C.F.R. § 1.823(a) (1989). The rule at 47 C.F.R. § 22.33(a) reads in pertinent part: "If a properly filed application for an initial license ... is mutually exclusive with another such application, the applicants shall be included in the random selection process...." 47 C.F.R. § 22.33(a) (1988). The notices referred to by plaintiffs stated that "[i]n the event that the application selected cannot be granted, another lottery will be held for that market and another application will be selected from the remaining applications."

Although 47 C.F.R. §§ 1.823 and 22.33(a) and the notices provide for lotteries, none of these writings can be characterized as contractual promises by the FCC to be bound to hold lotteries or re-lotteries. Agency rules are subject to change in accordance with recognized procedures and especially when so mandated by changes in the statute. Nor do sections 1.823 and 22.33 of the regulations or the notices state that the FCC is prohibited from changing its rules in the future in accordance with properly recognized agency procedures or that the FCC warrants that re-lotteries would be held within a definite time period. Thus, no contractual promise to hold re-lotteries within a definite time, in this case before the statutory change occurred, can be gleaned from the lottery notices or from FCC regulations.

In addition, the lottery notices and rules 47 C.F.R. §§ 1.823 and 22.33(a) cannot be read in isolation. On August 2, 1994, before the re-lotteries were scheduled to take place, the FCC revised Part 22 of its rules, which went into effect January 1, 1995. In the 1995 revision, section 22.33 was no longer included. Section 22.959 was added and stated in pertinent part:

> Pending applications for authority to operate the first cellular system on a channel block in an MSA or RSA market continue to be processed under the rules governing the

> processing of such applications that were in effect when those applications were filed, *unless the Commission determines otherwise in a particular case.*

47 C.F.R. § 22.959 (1995) (emphasis added).

When the lottery notices were issued, which indicated that if an application could not be selected, another lottery would be held, plaintiffs' applications would have been processed under section 22.33(a), which, at that time, provided for the FCC to award cellular licenses by lottery. Section 22.959, however, provided that cellular licenses be awarded by lottery, "unless the Commission determines otherwise in a particular case." 47 C.F.R. § 22.959. This qualifying language of section 22.959 does not manifest a clear intent to be bound to selection by lottery, because it indicates that the FCC, at its discretion, could decide not to follow the dictates of section 22.33(a). In other words, pursuant to its own rules, in effect in 1995, the FCC could exercise the discretion not to process pending applications for the RSA markets at issue by lottery. As a result, the lottery notices, which were not regulatory in nature, could be overridden by a subsequent FCC decision to handle particular license applications differently. Neither the regulations cited, nor the lottery notices, state a binding commitment to proceed by re-lottery and, therefore, do not indicate the mutuality of intent to contract, nor the definiteness of terms, required to establish an implied-in-fact contract.

It is well-established that an agency, such as the FCC, is permitted to modify its rules pursuant to rulemaking proceedings, and must follow the dictates of Congress. In this regard, the United States Court of Appeals for the District of Columbia Circuit found that the FCC possesses regulatory discretion to change license allocation procedures by "mak[ing] midstream rule adjustments, even though it

disrupts expectations and alters the competitive balance among applicants." *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 687-88 (D.C. Cir.), *reh'g and reh'g en banc denied* (2001); *see also PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1000-01 (D.C. Cir. 1999) (finding that an applicant who filed an application under lottery rules, in effect at the time the application was filed, did not thereby obtain a right to processing by lottery under those same rules. "We see nothing arbitrary or capricious in the Commission's decision to defer issuing licenses until it has finally settled upon the rules for doing so... [B]ecause [plaintiff] obtained no such right [to have an application considered on the rules in effect at the time of filing], the Commission's subsequent charge in the regulations was not retroactive, let alone impermissibly retroactive, rulemaking."); *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 241 (D.C. Cir. 1997) (The Commission's action did not "impair[] a right possessed by [plaintiff] because none vested on the filing of its application."), *reh'g denied* (1997); *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) ("A rule that upsets expectations, as we held in *Bell Atlantic Tel. Cos. v. FCC*, 316 U.S. App. D.C. 395, 79 F.3d 1195, 1207 (D.C. Cir. 1996), may be sustained 'if it is reasonable,' i.e., if it is not 'arbitrary' or 'capricious.' A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission 'is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest,' if it gives a reasoned explanation for the revision.") (citation omitted); *Bechtel v. FCC*, 957 F .2d 873, 881 (D.C. Cir. 1992) ("In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision ... has been removed.'... The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the

commission originally predicted they would.") (citations omitted); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F .2d 1551, 1555 (D.C. Cir. 1987) (rejecting the argument that an applicant possessed any right to a specific procedure for awarding a license); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("[T]he Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully."); *Implementation of Competitive Bidding Rules to License Certain RSAs*, 17 F.C.C.R. 1960, 1971 (2002) ("[R]egardless of when an application is filed, an applicant has no vested right to a continuation of the licensing procedures in effect at the time its application was filed.").

Thus, the FCC not only can, but should modify its rules and regulations when doing so will advance the public interest, even if such a change alters the plans and goals of applicants. When the plaintiffs' license applications were filed, the FCC did not warrant that its rules, procedures or statutory authority would remain unchanged while plaintiffs' applications were pending. Therefore, the FCC could not have intended to be contractually bound to a particular set of procedures. For this reason, the FCC could not have intended to enter into a contract with the plaintiffs in which it was bound to hold re-lotteries.

In *Celtronix Telemetry, Inc. v. FCC*, the District of Columbia Circuit Court distinguished changes in the FCC's rules with the breach of contract claims cited in *United States v. Winstar Corp.*:

> Celtronix also urges a somewhat makeshift argument that the FCC's rule change was a breach of contract citing *United States v. Winstar Corp.*, 518 U.S. 839, 135 L. Ed. 2d 964, 116 S. Ct. 2432 (1996). But there the government had contractually bound itself to bear the risk of specified regulatory change

> adverse to certain firms that had acquired failed saving and loan associations in reliance on that promise. Here, far from there being any such promise, there was, as we've noted, a long tradition of Commission authority to change rules governing already-issued licenses....

Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585, 590 (D.C. Cir. 2001) (citation omitted), *cert. denied*, 122 S. Ct. 2589, 153 L. Ed. 2d 778 (2002).

As in *Celtronix Telemetry, Inc. v. FCC*, the FCC in the present case, had not "contractually bound itself to bear the risk of specified regulatory change..." *Id.* By contrast, it is the plaintiffs who assumed the risk of a change in the FCC's rules. The long tradition of Commission authority to change rules effectively precluded the FCC from making a contractual promise to the plaintiffs. In order to establish an implied-in-fact contract, all the constituent elements of such a contract must be demonstrated. Since the plaintiffs have failed to establish the first element of an implied-in-fact contract, mutuality of intent, the plaintiffs have failed to establish that an implied-in-fact contract existed between the plaintiffs and the FCC. Therefore, the court need not address the remaining elements of an implied-in-fact contract. Absent mutuality of intent, plaintiffs' claim that an implied-in-fact contract came into existence must fail.

II. Jurisdiction to Review FCC Licensing Decisions

The defendant argues that, although the complaint nominally seeks money damages, the complaint actually requests and is "inextricably intertwined with" review of licensing orders issued by the FCC, a task that is exclusively within the province of the FCC and the United States Court of Appeals for the District of Columbia Circuit. According to the defendant, the complaint in this case is based upon two

licensing decisions by the Wireless Telecommunications Bureau of the FCC, specifically the Bureau's April 2, 1999 order dismissing the plaintiffs' applications for six of the RSAs, and the Bureau's April 29, 1999 order dismissing the plaintiffs' application for the Tex. 21 market.

The general statute governing judicial review of FCC decisions is 47 U.S.C. § 402 (2000). *See Cook, Inc. v. United States*, 394 F.2d 84, 85 (7th Cir. 1968). Under section 402(b), review of designated FCC decisions, including licensing decisions, falls within the exclusive jurisdiction of the District of Columbia Circuit Court of Appeals. 47 U.S.C. § 402(b). Section 402(b) states that: "Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia" in nine classes of cases involving the Commission's exercise of its radio licensing power.[3] *Id.*; *see*

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[3]Section 402(b) reads in full:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
> ~~(2)~~ By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
> (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
> (4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
> (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

NextWave Personal Communications, Inc. v. FCC, 254 F.3d 130, 140 (D.C. Cir. 2001), *aff'd*, Nos. 01-653 and 01-657, 2003 U.S. LEXIS 1059, *13 (U.S. Jan. 27, 2003) (example of an appeal to the District of Columbia Circuit Court pursuant to section 402(b) of the FCC's revocation of cellular licenses in which the court stated: "'[J]udicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to [the United States Court of Appeals for the District of Columbia Circuit].'" (quoting S. Rep. No. 82-44, at 11 (1951) (alteration in original); *In re Federal Communications Commission*, 217 F.3d 125, 140-41 (2000)); *Waterway Communications Sys., Inc. v. FCC*, 851 F.2d 401, 403 (D.C. Cir. 1988) ("Jurisdiction for review of FCC licensing-related decisions is governed by § 402(b).").

Section 402(b)(1) provides for an appeal to the District of Columbia Circuit Court by "any applicant for a construction permit or station license, whose application is denied by the Commission." 47 U.S.C. § 402(b)(1). In *Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d at 140, the District of Columbia Circuit Court found that "[i]n *Mobile Communications Corp. of Am. v. FCC*, [77 F.3d 1399, 1403

> (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
>
> (7) By any person upon whom an order to cease and desist has been served under section 312 of this title.
>
> (8) By any radio operator whose license has been suspended by the Commission.
>
> (9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

47 U.S.C. § 402(b).

(D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996)] the term 'station license' in section 402(b) encompasses PCS [personal communications service] licenses." PCS licenses, in turn, include licenses for cellular telephone service.[4] Therefore, 47 U.S.C. § 402(b)(1) provides for an appeal to the District of Columbia Circuit Court by any applicant for a cellular license, whose application is denied by the Commission. In the present case, the WTB issued orders dismissing the cellular license applications at issue. *In re Certain Cellular RSA Applications*, 14 F.C.C.R. 4619 (1999); *In re Certain Cellular RSA Applications in Market Nos. 599A and 672A*, DA 99-814 (Apr. 29, 1999).

In addition, as the defendant underscores, case precedent indicates that section 402(b) applies to licensing decisions and to such decisions that are "ancillary" to the licensing decisions expressly enumerated in section 402(b). For example, in *Cook v. United States*, the petitioner, Cook, sought to review and set aside an FCC order returning Cook's application for a radio broadcasting station license and an order denying Cook's petition for Commission reconsideration of the order returning the application. *Cook, Inc. v. United States*, 394 F.2d 84, 84-85 (7th Cir. 1968). The United States Court of Appeals for the Seventh Circuit noted that neither type of order is identified in the categories listed in section 402(b). *Id.* at 86. However, the Seventh Circuit found that the District of Columbia Circuit Court possessed exclusive jurisdiction to review the FCC orders under section 402(b) because the orders were "'ancillary' to an exercise of the Commission's 'licensing power,' since Cook's application was returned because it was filed after a cut-off date which was set by the Commission in order that

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[4]"PCS is a family of mobile or portable radio communications services 'that free individuals from the constraints of the telephone wire and allow them to send and receive communications while away from their homes or offices.'" Freeman *Eng'g Assoc., Inc. v. FCC*, 103 F.3d 169, 175 (D.C. Cir. 1997) (quoting *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 579 (D.C. Cir. 1994)).

the Commission be enabled to exercise its licensing power efficiently and expeditiously." *Id.* at 87. Similarly, in *Kessler v. FCC*, the District of Columbia Circuit Court found that it possessed exclusive jurisdiction under section 402(b) to review an FCC order refusing to accept the appellants' license applications, pending the adoption of new rules. *Kessler v. FCC*, 326 F.2d 673, 679 n.4 (D.C. Cir. 1963); *see also Tomah-Mauston Broadcasting Co. v. FCC*, 306 F .2d 811, 811-812 (D.C. Cir. 1962) (holding that the District of Columbia Circuit Court had sole jurisdiction under section 402(b) to review an FCC order denying a petition to stay and revoke a construction permit for a new broadcasting station because the order was considered "ancillary" to the grant of the construction permit.); *Metro. Television Co. v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955) (treating orders denying protests and orders denying rehearing as reviewable by the District of Columbia Circuit Court under section 402(b), although neither is specified in the nine subsections under section 402(b)); *Helena TV, Inc. v. FCC*, 269 F.2d 30, 30 (9th Cir. 1959) (declining jurisdiction over a petition to review an FCC order which was considered "ancillary to a protest proceeding" pending before the FCC, on the ground that sole jurisdiction was in the District of Columbia Circuit Court).

The plaintiffs argue that this case does not fall under section 402(b) because the WTB orders dismissing the applications were not final. The judicial review statute, 47 U.S.C. § 155(c)(7), states that: "[t]he filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection." 47 U.S.C. § 155(c)(7) (2000). In *Richman Brothers Records v. FCC*, the District of Columbia Circuit Court stated that filing of an application for review by the Commission is a condition precedent to judicial review of a decision taken pursuant to delegated

authority. *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1303 (D.C. Cir. 1997).

In this case, the orders dismissing the plaintiffs' applications were issued by the WTB, not by the full Commission. The plaintiffs did not appeal these orders internally within the FCC. The dismissal orders are not final decisions by the FCC and the District of Columbia Circuit cannot, now, hear this case under section 402(b). In their submissions to this court, the plaintiffs and the defendant concur that the WTB's staff orders were not final FCC orders which would have been immediately reviewable by the United States Court of Appeals for the District of Columbia Circuit pursuant to section 402(b).

While the plaintiffs are correct that the District of Columbia Circuit Court cannot, under the circumstances of this case, take jurisdiction, the fact that this case is not ripe for review in the District of Columbia Circuit does not speak to whether or not this court has jurisdiction over plaintiffs' claims. Had the plaintiffs exhausted their administrative remedies, an appeal of the FCC decision would have been proper in the District of Columbia Circuit Court, the court with statutory authority to review FCC licensing decisions. As discussed above, however, the plaintiffs argue that the District of Columbia Circuit Court lacks jurisdiction over this case because plaintiffs are requesting money damages for the government's alleged breach of an alleged implied-in-fact contract and, therefore, that the Court of Federal Claims has jurisdiction.[5]

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[5] In a Memorandum Opinion and Order issued on April 29, 2002 dismissing a claim filed by Hightower Communications, the FCC wrote:

> First, we find that the Commission lacks jurisdiction to entertain Hightower's claim for money damages. Indeed, Hightower concedes that "the issues [presented in its Application for Review] are within the exclusive jurisdiction of the United States Court of Federal Claims," and fails to cite any precedent supporting

The general rule is that "[w]hen challenged jurisdictional facts are so closely tied to the merits of a claim that a dismissal for lack of subject matter jurisdiction is essentially a dismissal on the merits, the court should generally assume jurisdiction and decide the case on the merits." *Lewis v. United States*, 32 Fed.Cl. 301, 305 (1994), *aff'd*, 70 F.3d 597 (Fed. Cir. 1995). The Federal Circuit concluded in *Lewis* that:

> Under this general rule, a complaint alleging that the plaintiff has a right to relief on a ground as to which the court has jurisdiction raises a question within the court's subject matter jurisdiction as long as the asserted

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> Commission jurisdiction, but merely states that it is raising these claims before the Commission out of an abundance of caution. We agree with Hightower's conclusion that the Commission does not have jurisdiction over claims for money damages, and are unaware of any case, statute, or rule authorizing the Commission to award money damages. This alone provides sufficient basis for dismissal of Hightower's claim.

In Re Certain Cellular Rural Service Area Applications, Nos. 9179072, *et al.*, F.C.C. 02-129, slip op. at 8 (2002) (footnotes omitted). Without taking a position on the merits of this court's jurisdiction, footnote 47 at the end of the above selected portion of the FCC Opinion and Order states: "To the extent that plaintiffs in the *Folden* case are taking issue with the regulatory decisions of the Commission, their arguments belong before the Commission and the federal courts of appeals." *Id.* at slip op. 8 n.47.

As discussed above, in the section of this opinion on plaintiffs' implied-in-fact contract claim, this court finds that plaintiffs' implied-in-fact contract claim is without merit. The FCC never entered into any form of contract with plaintiffs to hold re-lotteries or into a guarantee that plaintiffs would be issued licenses following submission of their applications. Moreover, this court believes that it was the congressional intent to have FCC licensing orders reviewed by the United States Court of Appeals for the District of Columbia Circuit.

> basis of jurisdiction is no pretextual, i.e., as long as the jurisdictional ground asserted in the complaint does not "appear[] to be immaterial and made solely for the purpose of obtaining jurisdiction." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 25, 57 L. Ed. 716, 33 S. Ct. 410 (1913) (no jurisdiction if "plaintiff was not really relying upon the patent law for his alleged rights"); *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U.S. 282, 287, 46 L. Ed. 910, 22 S. Ct. 681 (1902) (no jurisdiction if jurisdictional allegations "were immaterial and made for the purpose of creating a case cognizable by the court").

Lewis v. United States, 70 F.3d at 603 (alteration in original). The Federal Circuit in *Lewis* wrote further.

> To be sure, the Supreme Court has stated that there may be instances in which a claim that is otherwise within the court's jurisdiction is so insubstantial on its merits that a dismissal may termed jurisdictional. In this century, however, the Court's references to that exception to the general rule have often been unenthusiastic, and it may be that the exception is best viewed as a vestige of nineteenth-century practice that has no continuing vitality in the age of modern pleading. *See Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. at 249 ("Even a patently frivolous complaint might be sufficient to confer power to make a final decision that is [on the merits], binding as *res judicata* on the parties."); *Bell v. Hood*, 327 U.S. at 683 ("The accuracy of calling these dismissals jurisdictional has been

> questioned."); *see also Yazoo County Indus. Dev. Corp. v. Suthoff* , 454 U.S. 1157, 1160, 71 L. Ed. 2d 316, 102 S. Ct. 1032 (1982) (Rehnquist, J., dissenting from denial of *certiorari*) (jurisdictional dismissal for "insubstantiality" are "wholly at odds with Rule 12(b) of the Federal Rules of Civil Procedure"). The "frivolousness" exception has no apparent grounding in the Federal Rules of Civil Procedure, or the parallel Rules of the United States Court of Federal Claims. Moreover, in light of the rule that a jurisdictional dismissal is not *res judicata* as to the underlying merits of the dispute, *see Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 640 (Fed. Cir. 1989), the "frivolousness" exception gives rise to the anomaly that if frivolous claims are dismissed for want of jurisdiction, rather than on the merits, the principle of *res judicata* will be least applicable to the most insubstantial claims.
>
> Because the Supreme Court has not overturned the line of cases countenancing the dismissal of frivolous claims on jurisdictional grounds, we are not free to disregard that doctrine. Nonetheless, the Supreme Court has made clear that such jurisdictional dismissals for frivolousness must be "confined" to cases "that are very plain." *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. at 274, see also *Hagans v. Lavine*, 415 U.S. 528, 542-43, 39 L. Ed 2d 577, 94 S. Ct. 1372 (1974).

Lewis v. United States, 70 F.3d at 603-04; *see also Bell v. Hood*, 327 U.S. 678, 682 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim

under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is insubstantial and frivolous."); *City of Cincinnati v. United States*, 153 F.3d at 1377 ("[T]he invocation of the implied contract theory is sufficient ... to set forth a basis for subject-matter jurisdiction, because the [plaintiff] has made a non-frivolous assertion of an implied contract with the United States.") *William M. Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000); *Trauma Serv. Group v. United States*, 104 F.3d at 1325; *Spruill v. Merit Sys. Protection Bd.*, 978 F.2d at 687-88.

Plaintiffs ignored the prescribed channels within the FCC and before the District of Columbia Circuit Court for redress of their unapproved applications, and, instead, conjured a contract theory from the mere chance to obtain a cellular license following submission of their applications. Plaintiffs use the pretext of a contract review to seek redress from applicable FCC statutes and regulations. There were no contract negotiations and there were no contract documents, so plaintiffs' attempt to resort to a contract theory is, of necessity, based on alleged implied contracts. Courts should not give credence to plaintiffs' attempts to circumvent established agency and federal court procedures, particularly since not only was no contract formed, but no contract was ever contemplated. Plaintiffs can offer the court no precedent to support their novel attempt to imply a contract under the facts presented.

This court has found above that on the merits no implied-in-fact contract between the defendant and the plaintiffs came into existence. Recognizing the rare instances in which the appellate courts have been willing to invoke the "frivolousness" exception, *see Lewis v. United States*, 70 F.3d at 603-04, this court nonetheless believes that the instant case may provide one of those rare examples. If, as normally would be the case for claims like the ones brought

by the plaintiffs, no implied-in-fact contracts would come into existence between a license applicant and the FCC, it would be senseless to force this or any other court to repeatedly address the jurisdictional arguments and/or contract allegations. As discussed above, the intent of Congress to have FCC licensing application decisions reviewed by the Court of Appeals for the District of Columbia seems clear. For plaintiffs to use valuable court time by renaming their claim and thereby seeking redress in a different court, or because they failed to pursue their administrative remedies to seek another forum for redress, is not an efficient use of the judicial resources at the trial or appellate level. To acknowledge the possibility of the existence of a contract under these circumstances for the purposes of jurisdiction, only to, ultimately, find no contract in existence, is to undermine statutory and regulatory procedures carefully designed to address grievances associated with FCC licensing applications. This court believes that plaintiffs' implied-in-fact contract claims represent one of those "instances in which a claim that is otherwise within the court's jurisdiction is so insubstantial on its merits that a dismissal may be termed jurisdictional." *Lewis v. United States*, 70 F.3d at 603.

III. Takings Claim

Plaintiffs' takings claims are based on the theory that the government took contract rights of the plaintiffs without paying just compensation pursuant to the Fifth Amendment to the Constitution. The plaintiffs allege that the FCC's decision to cancel the lotteries, in anticipation of revocation of the FCC's lottery authority by Congress, violated the Takings Clause of the Fifth Amendment.

The plaintiffs also argue that Congress, by the enactment of section 1007 of the Local TV Act of 2000, appropriated plaintiffs' contract rights. This argument refers to the three tentative selectees from the initial lotteries for three RSAs,

none of which are plaintiffs in the present action: Great Western Cellular Partners (Great Western), selected in the initial lottery for the Minn. 11 license; Cellwave Telephone Services L.P. (Cellwave), selected in the initial lottery for the Fla. 11 license; and FutureWave General Partners L.P. (FutureWave), selected in the initial lottery for the Pa. 4 license. In each case, the FCC dismissed the tentative selectees' applications pursuant to prohibitions in FCC regulations that were in effect at the time. The District of Columbia Circuit Court affirmed the FCC orders, approving of the dismissal of the applications as lawful exercises of the FCC's authority. *See Cellwave Telephone Services L.P. v. FCC*, 30 F.3d 1533, 1538 (D.C. Cir. 1995); *Great Western Cellular Partners v. FCC*, 72 F.3d at 919. Subsequently, the Local TV Act of 2000 was enacted, directing the FCC to reinstate the three applications initially selected in the lotteries for those three RSAs, and to award the licenses to those applicants, if their applications otherwise met the FCC's requirements. *See* Pub. L. No. 106-553, Title X, § 1007, 114 Stat. 2762.[6]

In addition, plaintiffs assert that the Local TV Act of 2000 constitutes an uncompensated taking of the plaintiffs' contract rights because the Local TV Act of 2000 directed the FCC to charge the previously disqualified tentative selectees license fees, which the plaintiffs maintain were less than fair market value license fees. The plaintiffs argue that the statute, therefore, conferred a private benefit on those

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[6] Plaintiffs also argue that the enactment of the Local TV Act of 2000, which directed the FCC to reinstate the three original selectees for cellular markets, was a violation of the doctrine of "separation of powers," in that Congress had overridden a determination by the District of Columbia Circuit Court that the FCC was justified in not awarding the markets to those three original selectees. To the extent that plaintiffs seek a declaratory judgment on the constitutionality of the Local TV Act of 2000, this court is not the proper forum to render such a pronouncement. *See Adair v. United States*, 227 Ct. Cl. 345, 353, 648 F.2d 1318, 1323-1324 (1981) (quoting *United States v. King*, 395 U.S. 1, 5 (1968)).

tentative selectees. According to the plaintiffs, the Local TV Act of 2000 constitutes an uncompensated taking of plaintiffs' contract rights in that the contract rights were not taken "for public use," as mandated by the Fifth Amendment, but for the private use of those awarded cellular licenses.

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. In order to succeed "[a]s part of a takings case, the plaintiff must show a legally-cognizable property interest. *Sante Fe Pacific R.R. Co. v. United States*, 294 F.3d 1336, 1344 (Fed. Cir. 2002); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir.), *reh'g denied* (1993) ("Not all losses generate a Fifth Amendment taking.") (citing *United States ex rel. Tennessee Valley Auth. v. Ponelson*, 319 U.S. 266, 281 (1943)). The plaintiffs allege that the property rights taken by the government in the case at bar are their contract rights to have chances of winning or participating in re-lotteries for the cellular licenses at issue. As discussed above, however, the court has found that no express or implied-in-fact contract arose between the plaintiffs and the FCC. Therefore, having failed to establish the existence of a legally cognizable contract right or property interest, plaintiffs cannot successfully present a proper takings claim under the Fifth Amendment to the Constitution.

Nor do plaintiffs' claims meet the test for a regulatory taking. The United States Court of Appeals for the Federal Circuit has stated the test for a regulatory taking as follows:

> a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.
> b) With regard to the interest alleged to be taken, there has been a regulatory taking if

(1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
(2) the property owner had distinct investment-backed expectations; and
(3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies Harbor, Inc. v. United States, 28 F.3d at 1179. Applying the second prong of this test to the case before this court, plaintiffs have failed to demonstrate that they could have had distinct investment-backed expectations of static, FCC application procedures, and, therefore, have failed to meet the test for a regulatory takings.

Plaintiffs in a highly regulated field such as FCC licensing can have no distinct investment-backed expectations that include a reliance upon a legislative and regulatory status quo. *See Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958), *reh'g denied*, 358 U.S. 937 (1959) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); *see also Concrete Pipe and Prods. of Cal, Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 646 (1993) ("'[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations ... even though the effect of the legislation is to impose a new duty or liability based on past acts,' Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted.") (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)) (footnotes omitted; alteration in original)); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-23 (1986) (Appellants' assertion that "a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment –

if accepted, would prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others."); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1349, 1354 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2293, 152 L. Ed. 2d 1051 (2002); *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996), *reh'g denied* (1997); *Branch v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 810 (1996); *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1106 (1994); *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 960 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992) ("'The instant case involves a regulatory action in a highly regulated industry in which the government took actions that reasonably should have been expected by plaintiffs ... .'") (quoting *Am. Cont'l Corp. v. United States*, 22 CI. Ct. 692, 701 (1991)).

As noted earlier, "it is well-established that regardless of when an application is filed, an applicant [for a cellular license] has no vested right to a continuation of the licensing procedures in effect at the time its application was filed." *In re Implementation of Competitive Bidding Rules to License Certain RSAs*, 17 F.C.C.R. 1960, 1971 (2002) (footnote omitted); *see also Bachow Communications, Inc. v. FCC*, 237 F.3d at 687-88; *PLMRS Narrowband Corp. v. FCC*, 182 F.3d at 1000-01 (finding that an applicant who filed an application under lottery rules did not thereby obtain a right to processing by lottery); *Chadmoore Communications v. FCC*, 113 F.3d at 241 (The Commission's action could not have "impaired a right possessed by [Chadmoore] because none vested on the filing of its application.").

The FCC not only can change, but is expected to change, its rules and regulations to advance the public interest, or in response to congressional direction. The plaintiffs before the court could not reasonably have possessed distinct investment-backed expectations that the FCC was required

to hold the scheduled re-lotteries under any and all circumstances. In sum, since the plaintiffs possess neither a property interest that could potentially be taken, nor could have held distinct, investment-backed expectations of static FCC application procedures, the plaintiffs' takings claims are rejected.

CONCLUSION

Plaintiffs have failed to establish the existence of an implied-in-fact contract with the defendant. The court, therefore, **GRANTS** defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Because this court does not have authority to review FCC licensing decisions, defendant's motion to dismiss for lack of subject matter jurisdiction also should be granted. Finally, plaintiffs do not hold a property interest protected by the Fifth Amendment and plaintiffs cannot demonstrate the requisite, distinct investment-backed expectations to support a takings claim. Therefore, defendant's motion to dismiss for failure to state a claim upon which relief can be granted with regards to plaintiffs' takings claim also is **GRANTED**. The Clerk's Office shall dismiss plaintiffs' complaint and enter **JUDGMENT** consistent with this opinion.

IT IS SO ORDERED.

MARIAN BLANK HORN
JUDGE

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

GENE A. FOLDEN P.O. Box 1796 Boca Raton, FL 33432 COASTAL COMMUNICATIONS ASSOCIATES P.O. Box 299 Charleston, SC 29401 JUDITH A. LONGSHORE 12 Chapel Street Canton, NY 13617 on behalf of themselves and all Others similarly situated, Plaintiffs, v. THE UNITED STATES, Defendant.	)	No. 01-456C (Judge Marion Blank Horn)

AMENDED CLASS ACTION COMPLAINT

Introduction

This is a class action brought by Gene A. Folden ("Folden"), Coastal Communications Associates ("Coastal") and Judith A. Longshore ("Longshore"), on behalf of themselves and all others similarly situated, against the United States ("Government") for damages for the breach by

the Federal Communications Commission ("FCC") of its implied-in-fact contracts to hold lotteries to award licenses to provide cellular radiotelephone service in seven rural service areas ("RSAs") and for the taking of the plaintiffs' contract rights in violation of Article III and the Fifth Amendment of the Constitution.

Jurisdiction

1. Plaintiffs claim damages in excess of $10,000. This Court has jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1).

Parties

2. Plaintiffs filed applications with the FCC and paid $200 entry fees to participate in seven lotteries that were to be held by the FCC to award cellular licenses to serve the North Dakota 3 - Barnes ("N.D. 3"), Minnesota 11 - Goodhue ("Minn. 11"), Texas 21 - Chambers ("Tex. 21"), Arkansas 9 - Polk ("Ark. 9"), Florida 11 - Monroe ("Fla. 11"), Puerto Rico 5 - Ceiba ("P.R. 5"), and Pennsylvania 4 - Bradford ("Pa. 4") RSAs (the "Seven Licenses").

3. Plaintiff Folden is a Florida resident. He paid a $200 entry fee for a chance to be selected in the FCC's lottery to award the license for Fla. 11. His application was initially accepted for filing by the FCC, and was included in the list published by the FCC of applications designated to be included in the lottery to award the Fla. 11 license.

4. Plaintiff Coastal is a South Carolina general partnership. Coastal paid $1,400 in entry fees for chances to be selected in the FCC's lotteries to award licenses for the Seven Licenses. Its applications for the Seven Licenses were initially accepted for filing by the FCC, and were included in lists published by the FCC of applications designated to be included in the lotteries to award those licenses.

5. Plaintiff Longshore is a resident of New York. She is the widow of, and successor in interest to, Michael D. Longshore. Mr. Longshore paid $800 in entry fees for chances to be selected in the FCC's lotteries to award licenses for N.D. 3, Minn. 11, Tex. 21, and Pa. 4. His applications for those four licenses were initially accepted for filing by the FCC, and were included in lists published by the FCC of applications designated to be included in the lotteries to award those licenses.

6. Plaintiffs are qualified to hold FCC licenses.

Class Action Allegations

7. Plaintiffs bring this action as a class action pursuant to Rule 23 of the United States Court of Federal Claims ("RCFC"). The class consists of all applicants which paid $200 entry fees and whose applications for one or more of the Seven Licenses were accepted for filing by the FCC. Therefore, the class members were entitled to have chances of winning one or more of the Seven Licenses according to the FCC's lottery rules and publicly announced procedures. The class excludes those applicants that became tentative selectees for the Seven Licenses, but which were disqualified by the FCC.

8. A motion to certify this action as a class action was filed with this Court on August 6, 2001.

Regulatory Background

9. For the purposes of issuing cellular licenses, the FCC divided the country into two types of geographic markets called "metropolitan statistical areas" and RSAs. The FCC awarded two competing cellular licenses in each market. One license was granted to a "wireline" operator that was an established local telephone company. The other license was granted to a "non-wireline" operator that was any party other

than an established local telephone company.

10. 1982, Congress enacted the Communications Amendment Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1087, 1094-95 (1982), which authorized the FCC to employ a random selection process, known as a lottery, to select licensees for certain communications services it regulated. *See* 47 U.S.C. 309(i).

11. In 1984, the FCC adopted rules for using lotteries to award cellular licenses. In 1985, the FCC amended its rules to explicitly provide that mutually exclusive cellular applications for the RSAs would be randomly selected. *See* 47 C.F.R. § 22.33(a) (1986).

12. An application selected in a lottery was examined by the FCC's staff for compliance with the agency's cellular application rules. An application that was not in compliance with those rules was unacceptable for filing and was dismissed. In that event, a second lottery, a "re-lottery," was to be held among the remaining applications to select another application for consideration. An application that the FCC found acceptable for filing was announced as the tentative selectee and was subject to petitions to deny by the competing applicants.

13. In 1987, the FCC prescribed charges for the regulatory services it provides to communications entities subject to its jurisdiction. Applicants for RSA licenses were charged $200 per application by the FCC for its regulatory services.

14. By 1987, the FCC had abandoned pre-lottery screening of applications. The FCC only checked to see if the applicant had: (a) certified the completeness of its application; (b) submitted an original application and a paper duplicate, the cover of which had to include the applicant's name, market number and frequency block for which it was

applying; and (c) provided two microfiche copies of its application.

15. The FCC's estimated cost to process an RSA cellular application for participation in a lottery was approximately $20.

16. On the eve of the lotteries of the cellular licenses for the RSAs, the FCC's cellular lottery rule provided:

> The random selection shall pick a tentative selectee and then repeat the random selection process with the remaining applicants, so that, in the event that the tentative selectee's application is denied, the other applicants will be ranked in order as alternative selectees. * * * If the tentative selectee is disqualified, or its application designated for hearing, the Commission will allow petitions to deny against the next-ranked tentative selectee.

17. The FCC's rule made alternative selectees available, thereby obviating the need to conduct re-lotteries if the first ranked selectee was disqualified.

18. In May 1988, the FCC changed its rule to give the Chief of its Common Carrier Bureau ("CCB") and its Managing Director the authority to determine on a case by case basis the number of applicants to be selected in each lottery. The new rule provided: "The designated Lottery Official shall select the winning applicant from among mutually exclusive applicants. The Lottery Official may select in rank order a number of additional applicants." 47 C.F.R. § 1.823(a) (1989). The FCC left intact the wording of the rule that stated that petitions to deny would be allowed "against the next-ranked tentative selectee" if the first-ranked selectee was disqualified or had its application set for hearing.

19. On August 18, 1988, when it announced the date of the first non-wireline RSA lottery, the FCC issued a "lottery notice" informing lottery participants that each one had been assigned a code number, and that only one code number would be drawn for each RSA. The FCC's lottery notice contained the statement: "In the event that the application selected cannot be granted, another lottery will be held for that market and another application will be selected from the remaining applications."

Facts

20. Applications to participate in the N.D. 3 lottery were filed September 7-9, 1988. The FCC accepted 581 applications for filing.

21. Applications to participate in the Minn. 11 lottery were filed September 14-16, 1988. The FCC accepted 702 Minn. 11 applications for filing.

22. Applications for Tex. 21 were filed October 5-7, 1988. The FCC initially accepted 606 applications for filing. Two more Tex. 21 applications were accepted later, conditioned on the FCC's action on a petition for reconsideration.

23. Applications for Ark. 9 were filed October 26-28, 1988. The FCC accepted 555 Ark. 9 applications for filing.

24. Applications to participate in the Fla. 11 lottery were filed November 2-4, 1988. The FCC initially accepted 666 Fla. 11 applications for filing. It subsequently accepted one additional application.

25. Applications to participate in the P.R. 5 lottery were filed November 8-10, 1988. The FCC accepted 491 P.R. 5 applications for filing.

26. Applications to participate in the Pa. 4 lottery were filed December 7-9, 1988. The FCC initially accepted 667 Pa. 4 applications for filing. Five more applications were accepted later by the FCC.

27. As shown in the chart below, the participants in the lotteries for the Seven Licenses paid a total of $855,200 for the chance to win one or more of the licenses.

RSA	Filed	No.	Paid
N.D. 3	9/9/88	581	$116,200
Minn. 11	9/16/88	702	$140,400
Tex. 21	10/7/88	608	$121,600
Ark. 9	10/28/88	555	$111,000
Fla.11	11/4/88	667	$133,400
P.R. 5	11/10/88	491	$98,200
Pa. 4	12/9/88	672	$134,400

28. The FCC released lottery notices prior to the lotteries for each of the Seven Licenses, as follows: N.D. 3 (Feb. 21, 1989), Minn. 11 (Mar. 16, 1989), Tex. 21 (Apr. 10, 1989), Ark. 9 (June 5, 1989), Fla. 11 (July 7, 1989), P.R. 5 (July 20, 1989), and Pa. 4 (Sept. 8, 1989).

29. Each of the seven lottery notices for the Seven Licenses contained the identical promise that, if the application of the original tentative selectee could not be granted, "another lottery will be held for that market and another application will be selected from the remaining applications."

30. The FCC held lotteries during the fall of 1988 and throughout 1989.

31. In each lottery, random numbers were drawn by use of a forced-air blower. Each number drawn from the blower represented a digit in the winning code number. Each contained ping-pong balls numbered between 0 and some other number depending on the number of applicants in the lottery.

32. The FCC held the lottery for N.D. 3 on April 13, 1989. TNT Communications ("TNT") won the lottery and became the "tentative selectee" for the N.D. 3 license.

33. The FCC held the lottery for Minn. 11 on May 4, 1989. Great Western Cellular Partners ("Great Western") won the lottery and became the tentative selectee for Minn. 11.

34. The FCC held the lottery for Tex. 21 on June 14, 1989. Sacramento RSA L.P. ("Sacramento") won the lottery and became the tentative selectee for Tex. 21.

35. The FCC held the lottery for Ark. 9 on August 9, 1989. New Era Telecommunications ("New Era") became the tentative selectee for Ark. 9.

36. The FCC held the lottery for Fla. 11 on August 23, 1989. Cellwave Telephone Services L.P. ("Cellwave") became the tentative selectee for Fla. 11.

37. The FCC held the lottery for P.R. 5 on September 20, 1989. TNT won again and became the tentative selectee for P.R. 5.

38. The FCC held the lottery for Pa. 4 on November 8, 1989. FutureWave General Partners L.P. ("FutureWave") became the tentative selectee for Pa. 4.

39. The table below identifies the winners (tentative selectees) of the lotteries for the Seven Licenses.

RSA	Lottery	Winner
N.D. 3	4/13/89	TNT
Minn. 11	5/4/89	Great Western
Tex. 21	6/14/89	Sacramento
Ark. 9	8/9/89	New Era
Fla. 11	8/23/89	Cellwave
P.R. 5	9/20/89	TNT
Pa. 4	11/8/89	FutureWave

40. In reliance on the FCC's re-lottery procedure, competing applicants for the Seven Licenses opposed the lottery winners in proceedings before the FCC.

41. The CCB's Mobile Services Division ("MSD") dismissed Sacramento's Tex. 21 application as defective in 1990. *See Continental Cellular*, 6 F.C.C.R. 6834 (1991), *recon. denied sub nom., Sacramento RSA L.P.*, 9 F.C.C.R. 3182 (1994). Thomas Domencich and the Committee for a Fair Lottery (collectively "CFL"), whose members were applicants for the Tex. 21 license, opposed Sacramento's petition for reconsideration of the dismissal of its Tex. 21 application.

42. The dismissal of Sacramento's Tex.21 applications was affirmed by an unpublished judgment with memorandum of the United States Court of Appeals of the District of Columbia Circuit ("D.C. Circuit") in *Sacramento RSA L.P. v. FCC*, 56 F.3d 1531 (D.C. Cir. 1995) (table).

43. Because it found Great Western, Cellwave, and FutureWave ineligible to be licensees, the MSD dismissed their applications for the Minn. 11, Fla. 11, and Pa. 4 licenses as defective in 1990 and 1991, and those actions

were affirmed by the FCC in 1992. *See Cellwave Tel. Services, L.P.*, 7 F.C.C.R. 5955 (1992), *recon. denied sub nom., Great Western Cellular Partners*, 8 F.C.C.R. 3222 (1993), *further recon. denied*, 10 F.C.C.R. 3885 (1995). CFL, whose members were applicants for the Minn. 11, Fla. 11, and Pa. 4 licenses, and Optima Cellular Partnership ("Optima"), an applicant for the Minn. 11 license, opposed the petitions filed by Great Western, Cellwave, and FutureWave for reconsideration of the dismissal of their applications.

44. The FCC's actions dismissing Cellwave's Fla. 11 application and FutureWave's Pa. 4 application were affirmed by the D.C. Circuit in *Cellwave Telephone Services L.P. v. FCC*, 30 F.3d 1533 (D.C. Cir. 1994). CFL intervened in the case before the D.C. Circuit in support of the FCC.

45. The dismissal of Great Western's Minn. 11 application was affirmed by an unpublished judgment of the D.C. Circuit in *Great Western Cellular Partners v. FCC*, 72 F.3d 919 (D.C. Cir. 1995) (table). Optima intervened in the case before the D.C. Circuit in support of the FCC.

46. In 1991, the CCB designated New Era's Ark. 9 application and TNT's applications for N.D. 3 and P.R. 5 for an evidentiary hearing. *See Algreg Cellular Eng'g*, 6 F.C.C.R. 2921, 2928 (CCB 1991). CFL and Applicants Against Lottery Abuses ("AALA"), whose members were applicants for the Ark. 9, N.D. 3, and P.R. 5 licenses, had filed petitions to deny the applications of New Era and TNT.

47. New Era's application for Ark. 9 was denied in 1992. *See Algreg Cellular Eng'g*, 7 F.C.C.R. 8686, 8751 (A.L.J. 1992), *aff'd*, 9 F.C.C.R. 5098, *recon. denied*, 9 F.C.C.R. 6753 (Rev. Bd. 1994), *aff'd*, 12 F.C.C.R. 8148 (1997), *recon. denied*, 14 F.C.C.R. 18528 (1999), *aff'd*, *Alee Cellular Communications v. FCC*, No. 99-1460, 2000 WL 521487 (D.C. Cir. Mar. 7, 2000). New Era allowed the denial of its

application to become final. *See Algreg*, 12 F.C.C.R. at 8155.

48. TNT's applications for N.D. 3 and P.R. 5 were dismissed in 1993 for failure to prosecute. *See Algreg Cellular Eng'g*, 8 F.C.C.R. 2226, 2226 (Rev. Bd. 1993).

49. CFL, AALA and others invested more than $2 million in one proceeding challenging the qualifications of TNT, New Era, and others, with the expectation that re-lotteries would be held to award licenses for N.D. 3, Ark. 9, and P.R. 5 if TNT and New Era were disqualified.

50. The FCC's practice was to proceed with re-lotteries and to condition subsequent license grants on the outcome of any appeals pursued by the previous lottery winners. The following chart sets forth the dates on which the Seven Licenses were available for re-lotteries.

RSA	**Available**
Ark. 9	5/29/91
N.D. 3	5/29/91
Tex. 21	7/17/90
P.R. 5	5/29/91
Fla. 11	3/19/90
Minn. 11	2/25/91
Pa. 4	1/9/91

51. On June 8, 1990, the FCC announced it would hold re-lotteries for three RSA licenses on July 31, 1990. The re-lotteries would be conducted among the applications on file excluding the dismissed applications. The FCC stated that, if any of the applications selected in the re-lotteries could not

be granted, yet another re-lottery would be held.

52. The re-lotteries were held on July 31, 1990, as scheduled.

53. On January 29, 1992, the FCC announced it would hold re-lotteries for twenty-nine RSA licenses on April 8, 1992. Once again, the FCC confirmed that additional re-lotteries would be held if any of the applications selected could not be granted. Although the Seven Licenses could have been included in the re-lotteries, only the Tex. 21 license was included.

54. The re-lotteries were held on April 8, 1992, as scheduled.

55. The winner of the Tex. 21 re-lottery, Alee Cellular Communications ("Alee"), was disqualified by the FCC on July 24, 1994. *See Algreg*, 9 F.C.C.R. at 5147-50. CFL and AALA were parties to the proceeding that resulted in the disqualification of Alee. Because of the disqualification, Alee's Tex. 21 application was denied by the Commercial Wireless Division ("CWD") of the FCC's Wireless Telecommunications Bureau ("WTB") on February 15, 2000. *See Alee Cellular Communications*, 15 F.C.C.R. 2831 (CWD 2000).

56. In 1991, the FCC began granting "interim operating authority" to "interim operators" permitting them to provide cellular service pending the award of the Seven Licenses. The following chart identifies the interim operators.

RSA	Interim Operator(s)
Ark. 9	Southwestern Bell Wireless, Inc.
N.D. 3	KETS Partnership; WWC Holding Co., Inc.
Tex. 21	Galveston Cellular Tel. Co.

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P.R. 5	CCPR Services, Inc.; San Juan Cellular Tel. Co.
Fla. 11	McCaw Communications of Florida, Inc.
Minn. 11	AT&T Wireless Services of Minnesota, Inc.

57. During this time period, the FCC supported legislation that would give it statutory authority to auction licenses.

58. On August 10, 1993, almost five years after the filing of the RSA applications, Congress enacted the Omnibus Budget Reconciliation of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-92 (1993) ("1993 Budget Act"), which authorized the FCC to employ auctions to choose among mutually exclusive applicants. *See* 47 U.S.C. § 309(j).

59. Revenues from the auctions were to be deposited in the Treasury or retained by the FCC to offset its expenses in implementing the auction process. *See id.* § 309(j)(8).

60. The 1993 Budget Act gave the FCC 210 days (until March 10, 1994) to prescribe rules to implement the auction process. *See* Pub. L. No. 103-66 § 6002(d)(1).

61. The 1993 Budget Act did not expressly authorize the FCC to promulgate retroactive auction rules.

62. The 1993 Budget Act included a special rule that allowed the FCC to use lotteries with respect to applications filed prior to July 26, 1993. *See id.* § 6002(e).

63. Reed E. Hundt became the Chairman of the FCC on November 29, 1993. Mr. Hundt was an advocate of spectrum auctions and was opposed to conducting any further lotteries.

64. On April 20, 1994, the FCC adopted rules implementing the auction provisions of the 1993 Budget Act. It decided that applications for cellular licenses filed after July 26, 1993 would be subject to auctions.

65. On July 14, 1994, the FCC decided that 10,900 applications for licenses for cellular unserved areas filed (in March 1993) prior to July 26, 1993 would be subject to lotteries under the special rule. The FCC did not specifically revisit its selection process for the 1988 applications for the initial cellular systems in the RSAs. Deeply troubled by the decision not auction the licenses, Chairman Hundt dissented.

66. On September 9, 1994, the FCC revised its cellular rules. New § 22.959 of those rules provided that the pending applications for the initial RSA cellular licenses would "continue to be processed under the rules governing the processing of such applications that were in effect when those applications were filed, unless the [FCC] determines otherwise in a particular case." 47 C.F.R. § 22.959 (1995).

67. Over Chairman Hundt's objections, the FCC continued to employ lotteries with respect to pre-July 26, 1993 applications.

68. On July 12, 1996, the FCC resumed the re-lottery process for applications for initial RSA cellular systems. It announced that re-lotteries would be conducted for six (Ark. 9, Fla. 11, Minn. 11, N.D. 3, Pa. 4, and P.R. 5) of the Seven Licenses on September 18, 1996. The FCC stated that the re-lotteries would be held in accordance with its July 14, 1994 decision to conduct lotteries with respect to the cellular unserved areas applications that had been filed prior to July 26, 1993. It confirmed, once again, that additional re-lotteries would be held if any of the applications selected on September 18, 1996 could not be granted.

69. The re-lottery process was halted apparently at the

request of Cellular Communications of Puerto Rico, Inc. ("CCPR"), whose affiliate was the interim operator in P.R. 5. CCPR was represented by Charles D. Ferris, former FCC Chairman, and Sara F. Seidman, former special assistant to the FCC's General Counsel for common carrier and wireless matters. In that capacity, Ms. Seidman had been actively involved in drafting the FCC's auction rules.

70. On August 23, 1996, Ms. Seidman had a telephone conversation with Chairman Hundt's legal advisor during which she argued that the FCC should auction the licenses for P.R. 5, Ark. 9, Fla. 11, Minn. 11, N.D. 3 and Pa. 4, rather than hold the re-lotteries scheduled for September 18, 1996.

71. On August 26, 1996, Ms. Seidman met with the legal advisor to FCC Commissioner James H. Quello, and again argued that the upcoming re-lotteries should not be held and that the six licenses instead should be auctioned.

72. On August 28, 1996, Ms. Seidman repeated her arguments in a meeting with the legal advisor to FCC Commissioner Rachelle B. Chong. On the same day, she made written ex parte presentations on the subject of the September 18, 1996 re-lotteries to the legal advisor to FCC Commissioner Susan Ness and the Chief of the CWD.

73. On September 9, 1996, Mr. Ferris and Ms. Seidman filed an *ex parte* petition on behalf of CCPR asking the FCC for a ruling that an auction will be held for the P.R. 5 license.

74. On the following day, September 10, 1996, the Chief of the CWD postponed the re-lotteries scheduled for September 18, 1996. No explanation was given for the postponement.

75. On October 24, 1996, the FCC issued a public notice inviting comment on CCPR's petition. While acknowledging that the pleading was an "impermissible" *ex parte*

presentation, the FCC treated it as a petition for a rulemaking requesting that auctions be used to award cellular licenses in the RSAs for which applications were filed prior to July 26, 1993, and in which the original lottery winner had been disqualified.

76. On April 17, 1997, the Coalition for Equity in Licensing petitioned the D.C. Circuit for a writ of mandamus directing the FCC to conduct the re-lotteries that it had postponed in September 10, 1996. On June 27, 1997, the D.C. Circuit denied the mandamus petition without prejudice to refiling after 180 days in the event the FCC failed to take action on the matter.

77. The FCC supported legislation that would repeal the agency's authority to conduct lotteries.

78. The FCC's lottery authority was repealed on August 5, 1997 by the enactment of the Balanced Budget Act of 1997, Pub. L. 105-33, § 3002(a)(4), 111 Stat. 251 (1997). *See* 47 U.S.C. § 309(i)(5)(A).

79. On April 2, 1999, the WTB dismissed the plaintiffs' applications for N.D. 3, Minn. 11, Ark. 9, Fla. 11, P.R. 5, and Pa. 4. *See Certain Cellular RSA Applications*, 14 F.C.C.R. 4619, 4621 (WTB 1999). The WTB held the FCC lacked authority to use lotteries to select among mutually exclusive applicants for initial licenses.

80. The WTB further held that plaintiffs were not entitled to a refund of their $200 filing fees, because they actually participated in the initial lotteries for the N.D. 3, Minn. 11, Ark. 9, Fla. 11, P.R. 5, and Pa. 4 licenses.

81. On April 29, 1999, the CWD dismissed the plaintiffs' applications for Tex. 21. *See Cellular RSA Applications in Market Nos. 599A and 672A*, DA 99-414, at 2 (CWD Apr. 29, 1999). The CWD held that the FCC was not authorized

to use lotteries, and that plaintiffs did not qualify for the refund of their $200 filing fees, because they participated in the initial lottery for Tex. 21.

82. On June 1, 1999, petitions for reconsideration of the dismissal of plaintiffs' applications for the Seven Licenses were filed by High Tower Communications, Inc. ("High Tower"), Miller Communications, Inc., Ranger Cellular, Rural Cellular Communications, Inc., Aztec Cellular Partnership, Talking Towers, Inc., Sunfish Cellular, Inc., Jeffrey K. Ramsey, Sarah K. Ramsey, and the Coalition for Equitable Return of Filing Fees.

83. High Tower sought reconsideration on the grounds that it had not been allowed to participate in the re-lotteries for which it had contracted. High Tower asked that the applicants be paid the value of the Seven Licenses.

84. On December 21, 2000, Congress enacted the Launching Our Communities' Access to Local Television Act of 2000, Pub. L. No. 106-553, Title X § 1007, 114 Stat.2762 ("Local TV Act"), which mandated the FCC to reinstate Great Western as the tentative selectee for Minn. 11, Monroe Telephone Services L.P. ("Monroe") (formerly Cellwave) as the tentative selectee for Fla. 11, and FutureWave as the tentative selectee for Pa. 4. Congress also directed the FCC to award licenses to the three reinstated tentative selectees within 90 days.

85. Congress directed the FCC to determine a "fee" for the Minn. 11, Fla. 11, and Pa. 4 licenses based on: (1) the "average price paid per person served" in the FCC's 1997 auction of fourteen Phase I and Phase II cellular unserved area licenses (Auction No. 12); and (2) twice the settlement payments ($350,000) ordered in *The Tellesis Partners*, 7 F.C.C.R 3168, 3170 (1992). *See* PL 106-553 § 1007(a)(3)(A).

86. A cellular unserved area is an area within an RSA that remained unserved after the five-year period had passed within which the RSA licensee had the exclusive right to build-out its cellular system. An area remained unserved, because the RSA licensee concluded that there was insufficient demand to justify the construction of facilities to serve the area.

87. The sale of the fourteen licenses for cellular unserved areas in Auction No. 12 raised only $1,842,533 for the Government. For example, the license for Hawaii 2 - Maui was sold for $10. Nevada 4 - Mineral was sold for $100.

88. On February 12, 2001, the FCC proposed rules under which it would auction the licenses for Ark. 9, N.D. 3, Tex. 21, and P.R. 5. *See Implementation of Competitive Bidding Rules to License Certain RSAs*, 16 F.C.C.R. 4296 (2001). It also disclosed that Congress had enacted special legislation requiring the reinstatement of Great Western, Monroe and FutureWave as tentative selectees.

89. On March 2, 2001, the WTB released an order refusing to reconsider the dismissal of plaintiffs' applications for the Seven Licenses. *See Certain Cellular RSA Applications*, 16 F.C.C.R. 4860 (WTB 2001). The WTB summarily rejected High Tower's contract claim. The WTB refused to refund the $853,600 plaintiffs paid for chances to win the Seven Licenses.

90. On March 16, 2001, the WTB announced that it had complied with the Local TV Act and granted the applications of Monroe for Fla.11, Great Western for Minn. 11, and FutureWave for Pa. 4. *See WTB Grants Rural Cellular Licenses*, 16 F.C.C.R. 5601 (WTB 2001). The three licensees were given eighteen months to pay license fees: $319,911 for Fla. 11; $510,526 for Minn.11; and $346,223 for Pa. 4.

91. The licenses for Fla. 11, Minn. 11, and Pa. 4 are valued at a total of $102,595,500.

92. On April 2, 2001, High Tower asked the FCC to review the WTB's order denying the petitions for reconsideration of the dismissal of plaintiffs' applications for the Seven Licenses.

93. Stating that the relief requested was subject to this Court's jurisdiction, High Tower nevertheless requested the FCC to (a) declare that it breached implied-in-fact contracts with plaintiffs, (b) award damages to the plaintiffs in the amount of $102.6 million, (c) declare that plaintiffs are entitled to the proceeds of the auction of the licenses for Ark. 9, N.D. 3, Tex. 21, and P.R. 4, and (d) schedule the auction of those four licenses within 120 days.

94. The FCC has taken no action with respect to High Tower's application for the FCC to review the dismissal of plaintiffs' applications.

95. The following table sets forth the fair market value of the Seven Licenses.

RSA	Value
N.D. 3	$17,404,800
Minn. 11	$53,535,000
Tex. 21	$11,868,000
Ark. 9	$8,127,700
Fla. 11	$30,188,500
P.R. 5	$4,092,000
Pa. 4	$18,872,000

Effect Of The Government's Actions

96. Plaintiffs paid $853,600 to the Government for chances to win lotteries for the Seven Licenses. By failing to award the Seven Licenses by lottery, the FCC deprived plaintiffs of their contract rights to have chances of winning licenses worth more than $144 million. That injury is both traceable to the FCC's failure to conduct re-lotteries and redressable by an award of money damages.

Count I
(Breach Of Implied-In-Fact Contracts
To Award N.D. 3 License By Lottery)

97. Plaintiffs repeat and incorporate by reference each and every allegation set forth in ¶¶ 1-92, above.

98. A lottery is a contractual arrangement.

99. The FCC was authorized by statute to conduct lotteries to award RSA cellular licenses.

100. The FCC made a public offer to hold a lottery to award the N.D. 3 license if applicants properly filed applications for that license and paid a $200 per-application fee in accordance with the FCC's lottery rules and publicly announced procedures.

101. The FCC's offer was accepted by 580 of the plaintiffs ("N.D. 3 plaintiffs") when they properly filed applications for the N.D. 3 license and paid a $200 per-application fee in accordance with, and in reliance on, the FCC's lottery rules and publicly announced procedures.

102. By properly filing applications for the N.D. 3 license and paying the required fees, the N.D. 3 plaintiffs agreed to abide by the FCC's lottery rules and publicly announced procedures and formed binding contracts with the FCC.

103. The filing of applications and the payment of $116,000 in entry fees in compliance with the FCC's lottery rules and publicly announced procedures constituted consideration to the FCC to conduct a lottery to award the N.D. 3 license in accordance with those rules and procedures.

104. The entry fees paid by the N.D. 3 plaintiffs exceeded the FCC's costs in processing applications for participation in the lottery and produced a profit to the Government.

105. Included in the terms of the contracts between the FCC and the N.D. 3 plaintiffs was the FCC's promise that, in the event the originally-selected application could not be granted, it would hold a re-lottery for the N.D. 3 license in which the N.D. 3 plaintiffs could participate.

106. The FCC was bound to adhere to its lottery rules and its publicly announced re-lottery procedure.

107. In reliance on the FCC's promise to hold a re-lottery, some of the N.D. 3 plaintiffs incurred expenses participating in the FCC proceeding in which TNT's application was dismissed.

108. The FCC was bound to conduct a re-lottery for the N.D. 3 license, which it scheduled for September 18, 1996.

109. The conduct of the parties shows that they formed implied-in-fact contracts under which the FCC was bound to conduct a re-lottery to award the N.D. 3 license.

110. The FCC breached its contracts with the N.D. 3 plaintiffs when it decided not hold a re-lottery for the N.D. 3 license on September 18, 1996.

111. The FCC's breach deprived the N.D. 3 plaintiffs of their contract rights to have a chance to be awarded the N.D.

3 license which has a fair market value of $17,404,800.

112. The N.D. 3 plaintiffs are entitled to damages in the amount of $17,404,800.

Count II
(Breach Of Implied-In-Fact Contracts
To Award Minn. 11 License By Lottery)

113. Plaintiffs repeat and incorporate by reference each and every allegation set forth in ¶¶ 1-96, above.

114. A lottery is a contractual arrangement.

115. The FCC made a public offer to hold a lottery to award the Minn. 11license if applicants properly filed applications for that license and paid a $200 per-application fee in accordance with the FCC's lottery rules and publicly announced procedures.

116. The FCC's offer was accepted by 701 of the plaintiffs ("Minn. 11 plaintiffs") when they properly filed applications for the Minn. 11 license and paid a $200 per-application fee in accordance with, and in reliance on, the FCC's lottery rules and publicly announced procedures.

117. By properly filing applications for the Minn. 11 license and paying the required fees, the Minn. 11 plaintiffs agreed to abide by the FCC's lottery rules and publicly announced procedures and formed binding contracts with the FCC.

118. The filing of applications and the payment of $140,200 in entry fees in compliance with the FCC's lottery rules and publicly announced procedures constituted consideration to the FCC to conduct a lottery to award the Minn. 11 license in accordance with those rules and procedures.

119. The entry fees paid by the Minn. 11 plaintiffs exceeded the FCC's costs in processing applications for participation in the lottery and produced a profit to the Government.

120. Included in the terms of the contracts between the FCC and the Minn. 11 plaintiffs was the FCC's promise that, in the event the originally-selected application could not be granted, it would hold a re-lottery for the Minn. 11 license in which the Minn. 11 plaintiffs could participate.

121. The FCC was bound to adhere to its lottery rules and its publicly announced re-lottery procedure.

122. In reliance on the FCC's promise to hold a re-lottery, some of the Minn. 11 plaintiffs incurred expenses participating in the FCC proceeding in which Great Western's application was dismissed.

123. The FCC was bound to conduct a re-lottery for the Minn. 11 license, which it scheduled for September 18, 1996.

124. The conduct of the parties shows that they formed implied-in-fact contracts under which the FCC was bound to conduct a re-lottery to award the Minn. 11 license.

125. The FCC breached its contracts with the Minn. 11 plaintiffs when it decided not hold a re-lottery for the Minn. 11 license on September 18, 1996.

126. The FCC's breach deprived the Minn. 11 plaintiffs of their contract rights to have a chance to be awarded the Minn. 11 license which has a fair market value of $53,535,000.

127. The Minn. 11 plaintiffs are entitled to damages in the amount of $53,535,000.

Count III
(Breach Of Implied-In-Fact Contracts
To Award Tex. 21 License By Lottery)

128. Plaintiffs repeat and incorporate by reference each and every allegation set forth in ¶¶ 1-96, above.

129. A lottery is a contractual arrangement.

130. The FCC made a public offer to hold a lottery to award the Tex. 21 license if applicants properly filed applications for that license and paid a $200 per-application fee in accordance with the FCC's lottery rules and publicly announced procedures.

131. The FCC's offer was accepted by 606 of the plaintiffs ("Tex. 21 plaintiffs") when they properly filed applications for the Tex. 21 license and paid a $200 per-application fee in accordance with, and in reliance on, the FCC's lottery rules and publicly announced procedures.

132. By properly filing applications for the Tex. 21 license and paying the required fees, the Tex. 21 plaintiffs agreed to abide by the FCC's lottery rules and publicly announced procedures and formed binding contracts with the FCC.

133. The filing of applications and the payment of $121,200 in entry fees in compliance with the FCC's lottery rules and publicly announced procedures constituted consideration to the FCC to conduct a lottery to award the Tex. 21 license in accordance with those rules and procedures.

134. The entry fees paid by the Tex. 21 plaintiffs exceeded the FCC's costs in processing applications for participation in the lottery and produced a profit to the Government.

135. Included in the terms of the contracts between the FCC and the Tex. 21 plaintiffs was the FCC's promise that, in the event that any application selected in a re-lottery could not be granted, it would hold another re-lottery for the Tex. 21 license in which the Tex. 21 plaintiffs could participate.

136. The FCC was bound to adhere to its lottery rules and its publicly announced re-lottery procedure.

137. In reliance on the FCC's promise to hold a re-lottery, some of the Tex. 21 plaintiffs incurred expenses participating in the FCC proceedings in which Sacramento's application was dismissed and Alee was disqualified.

138. The FCC was bound to conduct another re-lottery for the Tex. 21 license.

139. The conduct of the parties shows that they formed implied-in-fact contracts under which the FCC was bound to conduct another re-lottery to award the Tex. 21 license.

140. The FCC breached its contracts with the Tex. 21 plaintiffs when it failed to hold another re-lottery for the Tex. 21 license.

141. The FCC's breach deprived the Tex. 21 plaintiffs of their contract rights to have a chance to be awarded the Tex. 21 license which has a fair market value of $11,868,000.

142. The Tex.21 plaintiffs are entitled to damages in the amount of $11,868,000.

Count IV
(Breach Of Implied-In-Fact Contracts
To Award Ark. 9 License By Lottery)

143. Plaintiffs repeat and incorporate by reference each and every allegation set forth in ¶¶ 1-96, above.

144. A lottery is a contractual arrangement.

145. The FCC was authorized by statute to conduct lotteries to award RSA cellular licenses.

146. The FCC made a public offer to hold a lottery to award the Ark. 9 license if applicants properly filed applications for that license and paid a $200 per-application fee in accordance with the FCC's lottery rules and publicly announced procedures.

147. The FCC's offer was accepted by 554 of the plaintiffs ("Ark. 9 plaintiffs") when they properly filed applications for the Ark. 9 license and paid a $200 per-application fee in accordance with, and in reliance on, the FCC's lottery rules and publicly announced procedures.

148. By properly filing applications for the Ark. 9 license and paying the required fees, the Ark. 9 plaintiffs agreed to abide by the FCC's lottery rules and publicly announced procedures and formed binding contracts with the FCC.

149. The filing of applications and the payment of $110,800 in entry fees in compliance with the FCC's lottery rules and publicly announced procedures constituted consideration to the FCC to conduct a lottery to award the Ark. 9 license in accordance with those rules and procedures.

150. The entry fees paid by the Ark. 9 plaintiffs exceeded the FCC's costs in processing applications for participation in the lottery and produced a profit to the Government.

151. Included in the terms of the contracts between the FCC and the Ark. 9 plaintiffs was the FCC's promise that, in the event the originally-selected application could not be granted, it would hold a re-lottery for the Ark. 9 license in which the Ark. 9 plaintiffs could participate.

152. The FCC was bound to adhere to its lottery rules and its publicly announced re-lottery procedure.

153. In reliance on the FCC's promise to hold a re-lottery, some of the Ark. 9 plaintiffs incurred expenses participating in the FCC proceeding in which New Era's application was dismissed.

154. The FCC was bound to conduct a re-lottery for the Ark. 9 license, which it scheduled for September 18, 1996.

155. The conduct of the parties shows that they formed implied-in-fact contracts under which the FCC was bound to conduct a re-lottery to award the Ark. 9 license.

156. The FCC breached its contracts with the Ark. 9 plaintiffs when it decided not hold a re-lottery for the Ark. 9 license on September 18, 1996.

157. The FCC's breach deprived the Ark. 9 plaintiffs of their contract rights to have a chance to be awarded the Ark. 9 license which has a fair market value of $8,127,700.

158. The Ark. 9 plaintiffs are entitled to damages in the amount of $8,127,700.

Count V
(Breach Of Implied-In-Fact Contracts
To Award Fla. 11 License By Lottery)

159. Plaintiffs repeat and incorporate by reference each and every allegation set forth in ¶¶ 1-96, above.

160. A lottery is a contractual arrangement.

161. The FCC was authorized by statute to conduct lotteries to award RSA cellular licenses.

162. The FCC made a public offer to hold a lottery to award the Fla. 11 license if applicants properly filed applications for that license and paid a $200 per-application fee in accordance with the FCC's lottery rules and publicly announced procedures.

163. The FCC's offer was accepted by 666 of the plaintiffs ("Fla. 11 plaintiffs") when they properly filed applications for the Fla. 11 license and paid a $200 per-application fee in accordance with, and in reliance on, the FCC's lottery rules and publicly announced procedures.

164. By properly filing applications for the Fla. 11 license and paying the required fees, the Fla. 11 plaintiffs agreed to abide by the FCC's lottery rules and publicly announced procedures and formed binding contracts with the FCC.

165. The filing of applications and the payment of $133,200 in entry fees in compliance with the FCC's lottery rules and publicly announced procedures constituted consideration to the FCC to conduct a lottery to award the Fla. 11 license in accordance with those rules and procedures.

166. The entry fees paid by the Fla. 11 plaintiffs exceeded the FCC's costs in processing applications for participation in the lottery and produced a profit to the Government.

167. Included in the terms of the contracts between the FCC and the Fla. 11 plaintiffs was the FCC's promise that, in the event the originally-selected application could not be granted, it would hold a re-lottery for the Fla. 11 license in which the Fla. 11 plaintiffs could participate.

168. The FCC was bound to adhere to its lottery rules and its publicly announced re-lottery procedure.

169. In reliance on the FCC's promise to hold a re-lottery,

some of the Fla. 11 plaintiffs incurred expenses participating in the FCC proceeding in which Cellwave's application was dismissed.

170. The FCC was bound to conduct a re-lottery for the Fla. 11 license, which it scheduled for September 18, 1996.

171. The conduct of the parties shows that they formed implied-in-fact contracts under which the FCC was bound to conduct a re-lottery to award the Fla. 11 license.

172. The FCC breached its contracts with the Fla. 11 plaintiffs when it decided not hold a re-lottery for the Fla. 11 license on September 18, 1996.

173. The FCC's breach deprived the Fla. 11 plaintiffs of their contract rights to have a chance to be awarded the Fla. 11 license which has a fair market value of $30,188,500.

174. The Fla. 11 plaintiffs are entitled to damages in the amount of $30,188,500.

Count VI
(Breach Of Implied-In-Fact Contracts
To Award P.R. 5 License By Lottery)

175. Plaintiffs repeat and incorporate by reference each and every allegation set forth in ¶¶ 1-96, above.

176. A lottery is a contractual arrangement.

177. The FCC was authorized by statute to conduct lotteries to award RSA cellular licenses.

178. The FCC made a public offer to hold a lottery to award the P.R. 5 license if applicants properly filed applications for that license and paid a $200 per-application fee in accordance with the FCC's lottery rules and publicly

announced procedures.

179. The FCC's offer was accepted by 490 of the plaintiffs ("P.R. 5 plaintiffs") when they properly filed applications for the P.R. 5 license and paid a $200 per-application fee in accordance with, and in reliance on, the FCC's lottery rules and publicly announced procedures.

180. By properly filing applications for the P.R. 5 license and paying the required fees, the P.R. 5 plaintiffs agreed to abide by the FCC's lottery rules and publicly announced procedures and formed binding contracts with the FCC.

181. The filing of applications and the payment of $98,000 in entry fees in compliance with the FCC's lottery rules and publicly announced procedures constituted consideration to the FCC to conduct a lottery to award the P.R. 5 license in accordance with those rules and procedures.

182. The entry fees paid by the P.R. 5 plaintiffs exceeded the FCC's costs in processing applications for participation in the lottery and produced a profit to the Government.

183. Included in the terms of the contracts between the FCC and the P.R. 5 plaintiffs was the FCC's promise that, in the event the originally-selected application could not be granted, it would hold a re-lottery for the P.R. 5 license in which the P.R. 5 plaintiffs could participate.

184. The FCC was bound to adhere to its lottery rules and its publicly announced re-lottery procedure.

185. In reliance on the FCC's promise to hold a re-lottery, some of the P.R. 5 plaintiffs incurred expenses participating in the FCC proceeding in which TNT's application was dismissed.

186. The FCC was bound to conduct a re-lottery for the

P.R. 5 license, which it scheduled for September 18, 1996.

187. The conduct of the parties shows that they formed implied-in-fact contracts under which the FCC was bound to conduct a re-lottery to award the P.R. 5 license.

188. The FCC breached its contracts with the P.R. 5 plaintiffs when it decided not hold a re-lottery for the P.R. 5 license on September 18, 1996.

189. The FCC's breach deprived the P.R. 5 plaintiffs of their contract rights to have a chance to be awarded the P.R. 5 license which has a fair market value of $4,092,000.

190. The P.R. 5 plaintiffs are entitled to damages in the amount of $4,092,000.

Count VII
(Breach Of Implied-In-Fact Contracts
To Award Pa. 4 License By Lottery)

191. Plaintiffs repeat and incorporate by reference each and every allegation set forth in ¶¶ 1-96, above.

192. A lottery is a contractual arrangement.

193. The FCC was authorized by statute to conduct lotteries to award RSA cellular licenses.

194. The FCC made a public offer to hold a lottery to award the Pa. 4 license if applicants properly filed applications for that license and paid a $200 per-application fee in accordance with the FCC's lottery rules and publicly announced procedures.

195. The FCC's offer was accepted by 671 of the plaintiffs ("Pa. 4 plaintiffs") when they properly filed applications for the Pa. 4 license and paid a $200 per-

application fee in accordance with, and in reliance on, the FCC's lottery rules and procedures.

196. By properly filing applications for the Pa. 4 license and paying the required fees, the Pa. 4 plaintiffs agreed to abide by the FCC's lottery rules and publicly announced procedures and formed binding contracts with the FCC.

197. The filing of applications and the payment of $134,200 in entry fees in compliance with the FCC's lottery rules and publicly announced procedures constituted consideration to the FCC to conduct a lottery to award the Pa. 4 license in accordance with those rules and procedures.

198. The entry fees paid by the Pa. 4 plaintiffs exceeded the FCC's costs in processing applications for participation in the lottery and produced a profit to the Government.

199. Included in the terms of the contracts between the FCC and the Pa. 4 plaintiffs was the FCC's promise that, in the event the originally-selected application could not be granted, it would hold a re-lottery for the Pa. 4 license in which the Pa. 4 plaintiffs could participate.

200. The FCC was bound to adhere to its lottery rules and its publicly announced re-lottery procedure.

201. In reliance on the FCC's promise to hold a re-lottery, some of the Pa. 4 plaintiffs incurred expenses participating in the FCC proceeding in which FutureWave's application was dismissed.

202. The FCC was bound to conduct a re-lottery for the Pa. 4 license, which it scheduled for September 18, 1996.

203. The conduct of the parties shows that they formed implied-in-fact contracts under which the FCC was bound to conduct a re-lottery to award the Pa. 4 license.

204. The FCC breached its contracts with the Pa. 4 plaintiffs when it decided not hold a re-lottery for the Pa. 4 license on September 18, 1996.

205. The FCC's breach deprived the Pa. 4 plaintiffs of their contract rights to have a chance to be awarded the Pa. 4 license which has a fair market value of $18,872,000.

206. The Pa. 4 plaintiffs are entitled to damages in the amount of $18,872,000.

* * * * *

Prayer For Relief

WHEREFORE, plaintiffs respectfully request the Court to:

1. enter a judgment on the claims asserted;

2. adjudge the alleged conduct of the FCC to be in breach of its implied-in-fact contracts with the plaintiffs to award the Seven Licenses by lottery;

3. adjudge the alleged conduct of the Government to be in violation of the Takings Clause of the Fifth Amendment by abrogating plaintiffs' contract rights to have chances to be awarded one or more of the Seven Licenses by lottery without just compensation;

4. declare that § 1007 of the Local TV Act violates Article III and the Public Use Clause of the Fifth Amendment as applied to deprive the Minn. 11, Fla. 11, and Pa. 4 plaintiffs of their vested property interests;

5. award the N.D. 3 plaintiffs damages in the amount of $17,404,800 or the fair market value of the N.D. 3 license as determined;

6. award the Minn. 11 plaintiffs damages in the amount of $53,535,000 or the fair market value of the Minn. 11 license as determined;

7. award the Tex. 21 plaintiffs damages in the amount of $11,868,000 or the fair market value of the Tex. 21 license as determined;

8. award the Ark. 9 plaintiffs damages in the amount of $8,127,700 or the fair market value of the Ark. 9 license as determined;

9. award the Fla. 11 plaintiffs damages in the amount of $30,188,500 or the fair market value of the Fla. 11 license as determined;

10. award the P.R. 5 plaintiffs damages in the amount of $4,092,000 or the fair market value of the P.R. 5 license as determined;

11. award the Pa. 4 plaintiffs damages in the amount of $18,872,000 or the fair market value of the Pa. 4 license as determined;

12. award the plaintiffs pre- and post-judgment interest;

13. award the plaintiffs reasonable attorneys' fees and other costs of bringing this action; and

14. grant such other, further and different relief as may be deemed just and proper.

Respectfully submitted,

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November 14, 2001

APPENDIX E

EXCERPTS FROM THE ADMINISTRATIVE PROCEDURE ACT

§ 702. Right to review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, or conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

EXCERPTS FROM § 402 OF THE
COMMUNICATIONS ACT OF 1934, AS AMENDED

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interest are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

* * * * *

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

EXCERPT FROM
THE TUCKER ACT

§ 1491. Claims against United States generally; actions Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(2)

FILED
MAY 20 2005
OFFICE OF THE CLERK

No. 04-1106

In the Supreme Court of the United States

GENE A. FOLDEN, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred by concluding that a challenge to a decision of the Federal Communications Commission not to hold lotteries to distribute cellular telephone licenses in certain markets falls within the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under 47 U.S.C. 402(b).

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Miscellaneous:

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S. Rep. No. 44, 82d Cong., 1st Sess. (1951) 8

John E. Theuman, Annot., *State Lotteries: Actions by Ticketholders Against State or Contractor for State*, 40 A.L.R. 4th 662 (1985) 13

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 379 F.3d 1344. The opinion of the Court of Federal Claims (Pet. App. 37a-77a) is reported at 56 Fed. Cl. 43.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2004. A petition for rehearing was denied on November 18, 2004. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on February 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the late 1980s, petitioners individually applied to the Federal Communications Commission (FCC or Commission) for licenses to provide cellular radiotelephone service in seven rural service areas (RSAs). Pet. App. 79a-80a, 83a-84a. Applying its rules in effect at the time, the Commission conducted lotteries to identify "tentative selectees" for the licenses from among the hundreds of applicants. *Id.* at 84a-85a. None of petitioners was chosen as a tentative selectee. *Id.* at 7a. In some markets, the tentative selectees were later disqualified. *Id.* at 86a-90a. The Commission rules then in effect provided that a second lottery would be held if the tentative selectee were disqualified. *Id.* at 82a. The rules set no time limit for conducting a second lottery. See *ibid.*

Second lotteries did not occur for any of the licenses at issue here. Although the Commission issued relottery notices for six of the seven RSAs, the Commission's Wireless Telecommunications Bureau (WTB or Bureau) issued a notice postponing the relotteries in order to consider an ex parte petition requesting that the license for one of the RSAs be distributed by auction rather than lottery. Pet. App. 9a. The WTB then sought public comment on the proposal to act by auction rather than lottery. Before the Commission could take further action on the matter, Congress enacted the Balanced Budget Act of 1997, Pub. L. No. 105-33, Tit. III, § 3002(a)(2), 111 Stat. 251, which abolished the Commission's authority to use lotteries for distributing cellular licenses and required the Commission to change its rules governing the issuance of those licenses. Pet. App. 93a. In administrative staff orders, the Commission dismissed, without prejudice, pending applications

for licenses in the affected markets, including those of petitioners. *Id.* at 93a-96a.

On December 21, 2000, Congress reinstated the original tentative selectees for three of the seven RSAs at issue in this case. See Launching Our Communities' Access to Local Television Act of 2000, Pub. L. No. 106-553, Tit. X, § 1007, 114 Stat. 2762A-138 to 2762A-140. In January 2002, after notice and comment, the Commission adopted rules governing auctions for licenses in the remaining four markets. Pet. App. 11a. Petitioners did not re-apply for those licenses or participate in those auctions. Nor did petitioners request review or reconsideration by the Commission of the Bureau's orders dismissing their applications. *Id.* at 12a.

2. In August 2001, petitioners filed suit in the Court of Federal Claims on behalf of themselves and "all others similarly situated" (Pet. App. 78a), asserting causes of action for breach of "implied-in-fact contracts to hold lotteries to award licenses to provide cellular radiotelephone service in seven rural service areas" and for "taking of [petitioners'] contract rights in violation of Article III and the Fifth Amendment of the Constitution." *Id.* at 79a; see *id.* at 78a-112a (complaint). Petitioners alleged that the Commission's public notices constituted an "offer" to contract, which they accepted by preparing and timely filing applications, and that petitioners provided consideration by paying the requisite filing fees. *Id.* at 18a. Petitioners argued that the Commission breached the implied contracts when it decided not to hold relotteries for the seven RSAs. *Ibid.*; *id.* at 98a, 100a, 102a, 104a, 106a, 108a, 110a.[1]

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[1] The Court of Federal Claims stayed consideration of petitioners' request for class certification pending resolution of the government's motion to dismiss. Pet. App. 13a-14a.

On March 28, 2003, the Court of Federal Claims dismissed the action. Pet. App. 37a-77a. The court first held (*id.* at 52a-62a) that petitioners' amended complaint failed to state a claim on which relief could be granted. The court stated that petitioners had "failed to establish that an implied-in-fact contract existed between the plaintiffs and the [Commission]" because they had "failed to establish the first element of an implied-in-fact contract, mutuality of intent." *Id.* at 62a. The court concluded that the "long tradition of Commission authority" (*ibid.*) to "modify its rules and regulations when doing so will advance the public interest" (*id.* at 61a) "effectively precluded the FCC from making a contractual promise to [petitioners]." *Id.* at 62a. The court termed petitioner's contract claim "insubstantial." *Id.* at 72a.

The court also held (Pet. App. 62a-72a) that it lacked subject-matter jurisdiction over the claim under the Tucker Act, 28 U.S.C. 1491, holding that "review of [the] FCC decisions" like those at issue here "falls within the exclusive jurisdiction of the District of Columbia Circuit" under 47 U.S.C. 402(b). Pet. App. 63a; see generally Addendum, *infra*, 1a (reproducing text of 47 U.S.C. 402(a) and (b)). The court observed that "Section 402(b) states that: 'Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia' in nine classes of cases involving the Commission's exercise of its radio licensing power." Pet. App. 62a (quoting 47 U.S.C. 402(b)). The court noted that while the Bureau's staff orders that petitioners challenged were not themselves "final FCC orders," if petitioners "[h]ad * * * exhausted their administrative remedies, an appeal of the FCC decision would have been proper in the District of Columbia Circuit * * *, the court with statutory authority to review FCC licensing decisions." *Id.* at 67a.

Accordingly, the court concluded, the orders were properly subject to the exclusive jurisdiction of the D.C. Circuit.[2]

3. The court of appeals affirmed, holding that the District of Columbia Circuit had exclusive jurisdiction under 47 U.S.C. 402(b) to review claims of the sort made by petitioners. Pet. App. 1a-34a. The court concluded that it is "clear that the D.C. Circuit's jurisdiction over claims that fall within [47 U.S.C.] 402(b) is exclusive." *Id.* at 21a. Citing *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984), in which this Court held that, under 47 U.S.C. 402(a), "[e]xclusive jurisdiction for review of final [Commission] orders * * * lies in the Court of Appeals," the court of appeals reasoned that "[i]t follows that the D.C. Circuit's jurisdiction pursuant to subsection 402(b) is also exclusive: subsections 402(a) and (b) comprise the entire statutory regime by which parties may obtain judicial review of Commission decisions." Pet. App. 21a-22a.

The court of appeals then concluded that the orders at issue fell within the exclusive jurisdiction of the D.C. Circuit under Section 402(b). Citing the legislative history of Communications Act amendments, Pet. App. 29a, the court noted that the D.C. Circuit, the Federal Circuit, and other federal courts of appeals had long held that "[S]ection 402(b) also extends to licensing decisions of the Commission that are 'ancillary' to those [categories] set forth" specifically in that provision. *Id.* at 27a. The court concluded that "the Commission's decision not to hold relotteries

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[2] The Court of Federal Claims also held that petitioners had failed to state a takings claim under the Fifth Amendment, Pet. App. 72a-77a, explaining that actors "in a highly regulated field such as FCC licensing can have no distinct investment-backed expectations [to rely] upon a legislative and regulatory status quo." *Id.* at 75a. Petitioners did not challenge that conclusion on appeal, nor do they seek to revisit that conclusion before this Court.

* * * constituted action[] ancillary to the licensing power of the Commission, specifically to the denial of a station license set forth in subsection 402(b)(1)," *id.* at 31a, because "by failing to hold the relotteries, the Commission necessarily determined that [petitioners'] lottery applications would not result in their receiving licenses." *Id.* at 32a. Thus the agency's actions "'in fact' denied [petitioners'] lottery applications." *Ibid.* The court stated that although petitioners had "frame[d] their challenge to the Commission's action in terms of a claim for breach of contract, * * * we must look to the true nature of [petitioners'] claim, not how [petitioners] characterize it. At root, [petitioners'] action plainly represents a challenge to the Commission's failure to hold relotteries for the seven RSA licenses at issue." *Id.* at 27a n.13.[3]

ARGUMENT

Petitioners claim (Pet. 21-26) that the court of appeals erred by concluding that the D.C. Circuit has exclusive jurisdiction pursuant to 47 U.S.C. 402(b) over their lawsuit challenging the Bureau's decision not to hold relotteries in the seven RSAs at issue in this case. Petitioners also argue (Pet. 2-3, 9-10, 16-17) that, by tendering completed license applications, they accepted the Commission's invitation to contract and created binding contracts enforceable through suits for money damages in the Court of Federal Claims. And petitioners further contend (Pet. 22-25) that the court of appeals applied an incorrect test for determining whether their claims were essentially contractual or regulatory, and that the decision of the court of appeals "will play havoc with the D.C. Circuit's jurisdiction" by rendering it

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[3] Because the court of appeals affirmed dismissal for lack of subject matter jurisdiction, it did not review the Court of Federal Claims' alternative holding dismissing for failure to state a claim.

essentially limitless. Pet. 25. All of those arguments lack merit. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly concluded that the D.C. Circuit has exclusive jurisdiction to review challenges to the Bureau's decision not to hold relotteries to distribute licenses. It is well established that Section 402(b) vests the D.C. Circuit with exclusive jurisdiction over specified classes of licensing decisions. See, *e.g.*, *Sykes* v. *Jenny Wren Co.*, 78 F.2d 729 (D.C. Cir.) (concluding that the jurisdiction of the D.C. Circuit under Section 402(b) is exclusive), cert. denied, 296 U.S. 624 (1935); accord *Sprint Communications Co.* v. *FCC*, 274 F.3d 549, 552 (D.C. Cir. 2001); *City of Rochester* v. *Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979) (stating that "[i]n § 402 of the Communications Act * * * Congress has * * * prescribed the exclusive mode of judicial review of such controversies as this"). The language of Section 402(a) provides that the courts of appeals have jurisdiction over "[a]ny proceeding to enjoin, set aside, annul or suspend any order of the Commission * * * except those appealable under subsection (b) of this section." This Court held in *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984), that section 402(a) gives the courts of appeals "[e]xclusive jurisdiction for review of final FCC orders" identified in that provision. *Id.* at 468. As the court of appeals correctly concluded (Pet. App. 21a-22a), it follows that "the D.C. Circuit's jurisdiction pursuant to subsection 402(b) is also exclusive," because "subsections 402(a) and (b) comprise the entire statutory regulatory regime by which parties may obtain judicial review of Commission decisions." See *Columbia Broad. Sys.* v. *FCC*, 211 F.2d 644, 647 (D.C. Cir. 1954) (appeals from all Commission decisions that do not fall within subsection 402(b)

are encompassed by 402(a)). That reading is confirmed by the legislative history of amendments to Section 402. See S. Rep. No. 44, 82d Cong., 1st Sess. 10 (1951) ("The language of * * * subsection [402(b)], when considered in relation to that of subsection (a), * * * would make it clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to that court [the D.C. Circuit].").

It is likewise well established that, to avoid interference with the comprehensive regulatory scheme established by Congress in the Communications Act of 1934, the scope of Section 402(b)'s exclusive jurisdiction extends not only to the nine specific categories of orders identified in that provision, but also to orders that "are 'ancillary' to those explicitly set forth in subsection 402(b)." Pet. App. 30a. For over forty years, federal courts of appeals have held that the D.C. Circuit's exclusive jurisdiction extends to Commission orders ancillary to those specifically identified in subsection 402(b). See *Cook* v. *United States*, 394 F.2d 84, 86-87 (7th Cir. 1968); *Tomah-Mauston Broad. Co.* v. *FCC*, 306 F.2d 811, 811-812 (D.C. Cir. 1962) (collecting authorities); *Kessler* v. *FCC*, 326 F.2d 673, 678 (D.C. Cir. 1963); *Helena TV, Inc.* v. *FCC*, 269 F.2d 30, 30 (9th Cir. 1959) (per curiam) (holding that a "Commission order * * * ancillary" to licensing proceedings "is cognizable only under section 402(b)"); accord *La Voz Radio de la Communidad* v. *FCC*, 223 F.3d 313, 318 (6th Cir. 2000) (D.C. Circuit "has exclusive jurisdiction over 'any suit seeking relief that might affect' its future statutory power of review" under Section 402(b)). Petitioners cite no authority to the contrary.

The court of appeals' decision represents a straightforward application of that well-established principle. "[T]he Commission's decision not to hold relotteries [for the

RSA licenses] * * * constituted action[] ancillary to the licensing power of the Commission, specifically to the denial of a station license set forth in subsection 402(b)(1)." Pet. App. 31a. As the court of appeals reasoned, "by failing to hold the relotteries, the Commission necessarily determined that [petitioners'] lottery applications would not result in their receiving licenses" and thus "'in fact' denied [petitioners'] lottery applications." *Id.* at 32a.

2. The conclusion that the D.C. Circuit has exclusive jurisdiction over claims such as petitioners' is not altered simply because, as petitioners contend (Pet. 22-23), their lawsuit was styled as one seeking money damages. As the court of appeals concluded, what matters is "the true nature of [petitioners'] claim, not how [petitioners] characterize it." Pet. App. 27a n.13. Petitioners concede (Pet. 22) that they "are asserting their rights to have chances to win valuable cellular licenses in FCC relotteries." As both the Court of Federal Claims (see, *e.g.*, Pet. App. 71a) and the court of appeals correctly concluded, "[a]t root, [petitioners'] action plainly represents a challenge to the Commission's failure to hold relotteries for the seven [rural service area] licenses at issue." *Id.* at 27a n.13. Petitioners err in contending (Pet. 21) that the court of appeals reached that conclusion only by "depart[ing] from the text of Petitioners' complaint." The amended complaint itself makes clear that petitioners sought review of staff orders of the WTB. The amended complaint specifically cited and discussed in detail several Bureau staff orders, including staff orders specifically rejecting petitioners' contract claims. See Pet. App. 93a-95a.[4] The amended complaint

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[4] Petitioners contend that "[a] contract claim similar to that of Petitioners' [sic] was never before the [Bureau] and never rejected in a [Bureau] order." Pet. 29 (emphasis omitted). That is incorrect. The complaint itself alleges that petitioners presented a contract claim to

asked the Court of Federal Claims to overturn the Bureau's rejection of petitioners' contract claims.

Petitioners err in contending (Pet. 22-23) that the standard employed by the court of appeals for determining whether a claim falls within the exclusive jurisdiction of the D.C. Circuit conflicts with that used by the D.C. Circuit itself and by other courts. See *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); Pet. 22 n.20 (citing decisions of the Second, Fourth, Sixth, and Ninth Circuits following *Megapulse*). As noted above, see p. 8, *supra*, the D.C. Circuit has long held that it has exclusive jurisdiction to review FCC actions that are "ancillary" to orders covered by 47 U.S.C. 402(b). *Megapulse*, which set forth some general and non-exclusive factors to consider in determining whether a claim was properly characterized as a contract action or as an Administrative Procedure Act claim, is not to the contrary. Indeed, *Megapulse* itself emphasized that "the mere existence of * * * contract-related issues" in a case does not convert a case into a contract action within the purview of the Tucker Act. 672 F.2d at 969.[5]

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the Bureau, which "summarily rejected" it. Pet. App. 95a; see *id.* at 96a (noting that one petitioner "requested the FCC to * * * declare that it breached implied-in-fact contracts" and to "award damages * * * in the amount of $102.6 million").

[5] *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc), cited by petitioners, Pet. 23, is also inapposite. That case involved interpretation of 28 U.S.C. 1500, which in relevant part provides that the Court of Federal Claims does not have jurisdiction over "any claim * * * in respect to which the plaintiff * * * has pending in any other court any suit or process against" the government. The court there simply addressed whether causes of action pending in various courts represented the same "claim" in the sense that term is used in the law of res judicata. See Restatement (Second) of Judgments § 24 (1982).

3. Petitioners err in contending (Pet. 25) that "[t]he Federal Circuit's decision will play havoc with the D.C. Circuit's jurisdiction." It is petitioners' novel and expansive view of the Federal Circuit's jurisdiction that would disrupt the "comprehensive statutory and regulatory regime" that Congress established for review of FCC orders. Pet. App. 23a. As the court of appeals noted, *ibid.*, the Communications Act requires a party to exhaust administrative remedies within the FCC "before pursuing a judicial remedy," and carefully "impose[s] * * * filing deadlines for appeals from Commission orders, provide[s] for interested parties to receive notice of an appeal, require[s] appeals to include specific information, and prescribe[s] the procedure by which an interested party may intervene in appeal proceedings." But under petitioners' view of the statute, a disappointed license applicant could circumvent those carefully crafted requirements by the simple expedient of bringing a putative damages action against the Commission challenging a bureau's failure to take the regulatory action it desired. That understanding would completely undermine the administrative review process and compromise the Commission's ability to create coherent policy. There is no reason to conclude that Congress wished the regulatory regime it had created to be so easily circumvented. Cf. *La Voz Radio*, 223 F.3d at 319 (holding that permitting broadcasters to seek review in district court would be "an impermissible end-run around the statutory scheme established in the Federal Communications Act") (internal quotation marks omitted). As the Court of Federal Claims concluded (Pet. App. 71a), "[c]ourts should not give credence to [petitioners'] attempts to circumvent established agency and federal court procedures."

Petitioners are likewise mistaken (Pet. 25) that the court of appeals' decision renders the D.C. Circuit's juris-

diction essentially limitless and is tantamount to "a judicial grant of immunity [to the FCC] from breach-of-contract claims." Pet. 27. Nothing in the court's opinion suggests that the D.C. Circuit would have jurisdiction over bona fide contract actions, or that the Commission could avoid damages liability on a claim that properly was characterized as a claim for breach of contract. By its terms, the decision extends only to Commission orders and actions that are ancillary to specific categories of orders enumerated in 47 U.S.C. 402(b). It did not purport to address the D.C. Circuit's authority to review Commission actions that are not ancillary to the specified classes of applications and licenses set forth in 402(b). Far from creating "immunity" of any sort, the court of appeals' decision preserves the Court of Federal Claims' Tucker Act jurisdiction to review traditional actions for damages arising from contracts.

4. Petitioners contend (Pet. 21) that the court of appeals erred by concluding that the D.C. Circuit had exclusive jurisdiction over the claim without "first * * * decid[ing] whether the Court of Federal Claims had exclusive original jurisdiction" under the Tucker Act. *Ibid.* That argument lacks merit. The court of appeals explicitly addressed whether the Court of Federal Claims had jurisdiction over petitioners' putative breach-of-contract action, and concluded that it did not because of the D.C. Circuit's exclusive grant of jurisdiction. As the court of appeals explained, "[w]here Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word 'exclusive' in the statute providing a forum for judicial review." Pet. App. 22a n.9 (internal quotation marks omitted) (quoting *Amerikohl Mining, Inc.* v. *United States*, 899 F.2d 1210, 1215 (Fed. Cir. 1990)).

Petitioners contend (Pet. 26-28) that the conclusion that their claims fall within the exclusive jurisdiction of the D.C. Circuit constitutes a "partial repeal of the Tucker Act" by implication, which they argue is contrary to the principle that repeals by implication are disfavored. Pet. 26. To begin with, however, petitioners' argument is based on the erroneous premise that lotteries conducted for regulatory purposes (such as the distribution of licenses) are properly analyzed as "implied-in-fact" contracts, and that once an agency proposes to distribute licenses by lottery, and applicants tender complete applications, a failure to distribute licenses by lottery constitutes breach of contract subjecting the agency to suit for money damages. Pet. 2-3, 9-10, 16-17. Even if there were a consensus that recreational lotteries subject sponsor States to suit under contract principles, but see John E. Theuman, Annotation, *State Lotteries: Actions by Ticketholders Against State or Contractor for State*, 40 A.L.R. 4th 662, 663 (1985) ("contestants in [state] lotteries have commonly had little success in seeking to recover prizes * * * or [in making] other claims arising out of the games, where the conduct of the lottery had not clearly violated the enabling statutes and regulations"), it would not follow that an agency's announcement that it intends to distribute licenses by lottery constitutes an invitation to contract. Petitioners cite no authority for the proposition that such an announcement would constitute an "offer" under contract principles, and there is every reason to believe it would not.

In the regulatory context, there is a long tradition of agencies "modify[ing] [their] rules and regulations" to "advance the public interest, even if such a change alters

the plans and goals of applicants." Pet. App. 61a.[6] This Court has emphasized in the Contract Clause context the importance of safeguarding the state's regulatory power against restriction. Cf. *Stone* v. *Mississippi*, 101 U.S. 814, 820 (1879) (concluding that Contract Clause does not prohibit a State from outlawing lotteries even after chartering a lottery, emphasizing that "[t]he contracts which the Constitution protects are those that relate to property rights, not governmental"). An applicant for a license therefore has no justifiable expectation that an agency's announced intention to distribute licenses by lottery constitutes a binding promise. As the Court of Federal Claims correctly concluded, "[t]he long tradition of Commission authority to change rules effectively precluded the FCC from making a contractual promise to [petitioners]," and thus there was no "mutuality of intent" to support the conclusion that the Commission and petitioners formed a contract. Pet. App. 62a. Cf. *Stone*, 101 U.S. at 821 ("Any one * * * who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume

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[6] Accord, *e.g.*, *Celtronix Telemetry, Inc.* v. *FCC*, 272 F.3d 585, 590 (D.C. Cir. 2001) ("far from there being any such [contractual] promise, there was, as we've noted, a long tradition of Commission authority to change rules governing already-issued licenses"), cert. denied, 536 U.S. 923 (2002); *Bachow Communications, Inc.* v. *FCC*, 237 F.3d 683, 687-688 (D.C. Cir. 2001) (applicants for broadcast licenses had no "vested right" in enforcement of cut-off rules); *PLMRS Narrowband Corp.* v. *FCC*, 182 F.3d 995, 1000-1001 (D.C. Cir. 1999); *Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (rejecting argument that applicant possessed any right to specific procedure for awarding license); see also *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("[T]he Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully.").

[the prohibition on lotteries] at any time when the public good shall require, whether it be paid for or not."). Petitioners cite no authority to suggest that regulated parties could reasonably expect an agency's intent to distribute licenses in a particular way to constitute a binding contract.[7] Because petitioners' claim is not properly con-

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[7] The cases petitioners cite are inapposite. *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 60-62 (2d Cir. 1999), and *NextWave Personal Communications, Inc.* v. *FCC*, 254 F.3d 130 (D.C. Cir. 2001), aff'd, 537 U.S. 293 (2002), cited by petitioner (Pet. 17), involved only the question whether the FCC had the authority *under the applicable regulations and federal bankruptcy law* to cancel licenses on the ground that the license holders had declared bankruptcy and ceased to make payments for the purchase of the license. See 11 U.S.C. 525(a) (prohibiting "governmental unit[s]" from "revok[ing]" a bankrupt or debtor's license "solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable * * * under this title"). Neither case purported to determine whether public notice of intent to distribute licenses by lottery constitutes an invitation to contract. As petitioners concede (Pet. 17 n.17), in *In re NextWave*, the Second Circuit did not reach the question of what law governed FCC auctions and addressed "auction law" *only* as it "confirm[ed] and reinforce[d] the rationality of the FCC's interpretation of its regulations." 200 F.3d at 60. At most, that decision suggested in passing that contract principles might apply to a completed sale of a license, *id.* at 62, and says nothing about what agency communications can constitute an offer to contract. Similarly, in *NextWave* v. *FCC*, the D.C. Circuit held that the Commission "is bound by the usual rules governing the treatment of [licenses] *in bankruptcy*," 254 F.3d at 133 (emphasis added), and did not discuss contract law, much less the formation of contracts. *Cellco P'ship* v. *United States*, 54 Fed. Cl. 260 (2002) (see Pet. 28), involved only the decision whether to grant a stay and did not discuss whether the sale of licenses gives rise to enforceable contracts. *Commodities Recovery Corp.* v. *United States*, 34 Fed. Cl. 282, 289 (1995) (see Pet. 28), involved the auction of abandoned merchandise, not licenses. Petitioners cite no authority for treating the regulatory issuance of licenses as a contractual matter.

sidered a "contract" claim, it does not fall within the scope of Tucker Act jurisdiction.[8]

In any event, case law amply supports the conclusion that Congress intended the D.C. Circuit to be the exclusive forum for consideration of all such claims. This Court has consistently concluded that the creation of a comprehensive statutory and regulatory scheme that directs certain types of claims to be litigated in a specific forum supports the inference that Congress has withdrawn the Court of Federal Claims' Tucker Act jurisdiction over those claims. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (holding that litigation of medicare reimbursements is governed by the "precisely drawn provisions" of the Medicare statute rather than the Tucker Act); *Brown* v. *GSA*, 425 U.S. 820, 828 n.10, 834-835 (1976) (concluding that remedies against the United States for racial discrimination in employment, including under the Tucker Act, were repealed by implication by the Equal Employment Act of 1972); *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932) (holding that the Suits in Admiralty Act of 1920 had withdrawn by implication Tucker Act jurisdiction); see also *United States* v. *Fausto*, 484 U.S. 439, 454-455 (1988) (concluding that the enactment of the "comprehensive and integrated review scheme" of the Civil Service Reform Act

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[8] Petitioners contend that the Court of Federal Claims' conclusion that no contract was formed in this case represents an exercise of "hypothetical jurisdiction at its very worst" (Pet. 18) and that the court acted "ultra vires" in reaching that conclusion. Pet. 19. Because the Court of Federal Claims held in the alternative that it lacked jurisdiction over petitioners' claims, it appears that court did not engage in the practice of " 'assuming' jurisdiction for purpose of deciding the merits" that this Court has "decline[d] to endorse." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). In any event, this Court reviews only the judgment of the court of appeals, see 28 U.S.C. 1254(1); the trial court's alternative holding provides no basis for review.

repealed by implication judicial constructions of the Back Pay Act to cover certain claims). As the Court has held, "a precisely drawn, detailed statute pre-empts more general remedies." *Brown*, 425 U.S. at 834. Cf. also *Fiorentino* v. *United States*, 607 F.2d 963, 970 (Ct. Cl. 1979) ("It appears that the rule of strict construction of the consent to be sued overrides the rule that repeals by implication are disfavored."); *Puget Sound Power & Light Co.* v. *United States*, 23 Cl. Ct. 46, 57 (1991) (same), cert. denied, 502 U.S. 1091 (1992). In light of the "specific and comprehensive scheme for administrative and judicial review" that Congress provided in the Communications Act, Pet. App. 23a, the court of appeals correctly concluded that claims like petitioners' were within the exclusive jurisdiction of the D.C. Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2005

ADDENDUM

47 U.S.C. 402 provides in pertinent part:

(a) Procedure

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [28 U.S.C. 2342-2351].

(b) Right to appeal

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
>
> (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any

rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

* * * * *

(3)

Supreme Court, U.S.
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No. 04-1106

IN THE

SUPREME COURT OF THE UNITED STATES

GENE A. FOLDEN, COASTAL COMMUNICATIONS ASSOCIATES, AND JUDITH A. LONGSHORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Federal Circuit

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CCPR Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used to License Certain Cellular RSAs, 11 F.C.C.R. 13847 (1996) 2

Implementation of Competitive Bidding Rules to License Certain RSAs, 16 F.C.C.R. 4296 (2001) 2

Federal Statutes:

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REPLY BRIEF FOR PETITIONERS

Petitioners, Gene A. Folden, Coastal Communications Associates, and Judith Longshore, hereby reply to the Brief for the United States in Opposition ("Br.").

COUNTERSTATEMENT

1. The Federal Communications Commission ("FCC" or "Commission") breached implied-in-fact contracts to award cellular licenses for seven Rural Service Areas ("RSAs") in accordance with (or obeying) lottery rules that required it to hold relotteries. Respondent notes that the FCC's rules did not specify when relotteries were to be held. *See* Br. 2. However, on July 12, 1996, the FCC announced that it had selected September 18, 1996 as the date on which it would fulfill its obligation to hold a relottery for six of the seven RSAs. *See* App. 91a (¶ 68).

Over a five-day period in August 1996, a former FCC attorney representing Cellular Communications of Puerto Rico, Inc. ("CCPR"), made ex parte presentations to the legal advisors to Chairman Reed Hundt (an outspoken critic of lotteries) and Commissioners James Quello, Rachelle Chong and Susan Ness. *See* App. 90a-92a (¶¶ 63, 65, 67, 69-72). CCPR's counsel argued that the scheduled relottery should not be held for the six RSAs, including the Puerto Rico 5 - Ceiba RSA where an affiliate of CCPR was the interim operator. *See id.* 89a (¶ 56), 92a (¶¶ 70-72).

2. The Federal Circuit found that the FCC made the decision not to hold RSA relotteries, and that its decision was "announced" by the Commercial Wireless Division ("Division") of the FCC's Wireless Telecommunications Bureau ("Bureau" or "WTB") on September 10, 1996. *See id.* 9a-10a, 29a n.14, 32a. In fact, the Division notified the public that the relottery scheduled for the following week was "postponed." *See id.* 92a (¶ 74). No reason was given for the postponement. *See id.*

Respondent contends the Bureau postponed the relottery

in order to consider an ex parte petition CCPR filed on September 9, 1996, the day before the relottery was "postponed." *See* Br. 2. The facts Petitioners allege support the inference that CCPR's ex parte presentations to FCC decision-makers in August 1996 led to the decision to end the lottery process, not a petition CCPR filed the day before the scheduled relottery was "postponed." Moreover, on October 24, 1996, when it finally disclosed that CCPR's petition had been filed, the Division did not state that the relottery was postponed to allow for consideration of the petition.[1] That explanation was first offered by the FCC more than four years later, when it claimed the WTB postponed the relottery to "preserve the issue raised in CCPR's petition."[2] But the FCC's contractual and legal obligation was to adhere to its lottery rules that were in effect and required a relottery. *See* Pet. 11 n.11.

3. According to Respondent, before the FCC could act on CCPR's petition, Congress enacted the Balanced Budget Act of 1997 ("1997 Budget Act"), which repealed the FCC's authority to conduct lotteries. *See* Br. 2. The 1997 Budget Act was passed on August 5, 1997, approximately a year after the FCC decided not to hold relotteries and months after its final breach of the implied contracts. *See* App. 18a-19a, 93a (¶ 78). On April 2, 1999, the WTB dismissed CCPR's petition as "moot." *Certain Cellular RSA Applications*, 14 F.C.C.R. 4619, 4621 n.12 (WTB 1999) ("*Dismissal Order*"), *reconsideration denied*, 16 F.C.C.R. 4860 (WTB 2001) ("*Reconsideration Order*"), *application for rev. denied*, 17 F.C.C.R. 8508 (2002) ("*Final Order*").

4. Petitioners brought their breach-of-contract claims to the Court of Federal Claims seeking only money damages. *See* App. 110a-111a. They had no interest in obtaining judicial review of any FCC decision or order. Nevertheless,

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[1] *See CCPR Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used to License Certain Cellular RSAs*, 11 F.C.C.R. 13847, 13847-48 (1996).

[2] *Implementation of Competitive Bidding Rules to License Certain RSAs*, 16 F.C.C.R. 4296, 4299 (2001).

Respondent misled the Court of Federal Claims to conclude that Petitioners' complaint seeks judicial review of two WTB orders issued in April 1999 that dismissed their RSA lottery applications. *See* App. 62a-63a. The Federal Circuit disagreed. It found that the complaint "plainly represents a challenge to the Commission's failure to hold relotteries for the seven RSA licenses." *Id.* 27a n.13. It held that Petitioners seek judicial review of the FCC's decision not to hold relotteries, *see id.* 29a n.14, 34a, which the Division announced on September 10, 1996. *See id.* 9a, 29a n.14. It found the FCC's decision "in fact" denied Petitioners' applications, "albeit without issuing a formal order." *Id.* 32a.

5. Respondent misstates the case when it claims the Federal Circuit "concluded that the orders at issue fell within the exclusive jurisdiction of the D.C. Circuit" under § 402(b) of the Communications Act of 1934, as amended ("Act"). Br. 5. The court actually concluded that "despite the absence of a formal 'decision' or 'order' by the Commission, the decision not to hold relotteries for the seven RSA licenses at issue constituted an appealable decision within the meaning of subsection 402(b)." App. 29a n.14.[3] The FCC's off-the-record decision in 1996 to breach its implied contracts never became part of an FCC order.

ARGUMENT

1. Respondent repeats the misstatements that began the transformation of Petitioner's breach-of-contract suit into an appeal from an unappealable FCC decision. *Compare* Br. 9-10 & n.4 *with* Pet. 28-29. Respondent persists in claiming Petitioners' complaint clearly seeks "review of staff orders of the WTB," including "staff orders specifically rejecting [their] contract claims," and asks that the Bureau's "rejection" of their claims be "overturn[ed]." Br. 9-10.

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[3] Respondent also misstates that the court held that the D.C. Circuit has exclusive jurisdiction to review "challenges to the Bureau's decision not to hold relotteries." Br. 7. The court concluded the FCC made that decision. *See* App. 29a n.14. The WTB lacked the delegated authority to end the relottery process. *See* 47 C.F.R. § 0.291(a)(2) (1996).

First, Petitioners were not parties to any proceedings before the WTB. As they explained, High Tower Communications, Inc. ("High Tower") made an implied-in-fact contract claim, but not to the Bureau. *See* Pet. 7-8, 29. As one can plainly see, Petitioners' complaint unmistakably alleges that High Tower asked for Bureau reconsideration on the ground "it had not been allowed to participate in the relotteries for which it had contracted." App. 94a (¶ 83). The complaint alleged that the WTB "summarily rejected High Tower's contract claim." *Id.* 95a (¶ 89). The complaint is consistent with the *Reconsideration Order*. *See* 16 F.C.C.R. at 4862 n.12 ("High Tower provides no support for its claim that the Commission 'promised' to process applications in a certain way in exchange for the payment of application fees.")

Petitioners allege that High Tower first made an implied-in-fact contract claim in an application for *Commission* review of the *Reconsideration Order*. *See* App. 96a (¶¶ 92, 93); Pet. 7-8. That allegation is confirmed by the *Final Order* in which the Commission discusses High Tower's implied-in-fact contract and damages claims at length. *See* 17 F.C.C.R. at 8514-17.[4] Thus, the agency's reported decisions confirm the Bureau did not address or reject an implied-in-fact contract claim founded on the common law of lotteries. *Compare* 16 F.C.C.R. at 4862 & n.12 *with* 17 F.C.C.R. at 8514-17 & n.56. No "staff orders specifically rejecting [P]etitioners' contract claims" exist, and their complaint cannot be read to ask the Court of Federal Claims to "overturn" any Bureau action. *See* App. 110a-111a. Respondent's claims to the contrary taint the Federal Circuit's determination that Petitioners seek judicial review instead of money damages. *See* App. 12a & n.5, 25a n.11 (discussing Petitioners' "failure" to preserve their right to

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[4]Nine months after Petitioners filed suit, the FCC confirmed that it lacks jurisdiction to adjudicate claims against the United States for money damages based on its breach of implied-in-fact contracts. *See Final Order*, 17 F.C.C.R. at 8515. Likewise, the D.C. Circuit is without jurisdiction to award money damages. *See* Pet. 23-24.

judicial review by seeking FCC review of the WTB's orders).

2. Respondent incorrectly contends that the Federal Circuit's decision does not conflict with any decision of any other court of appeals. *See* Br. 7. The court below decided that a complaint that explicitly seeks $144 million in monetary relief from the federal government does not invoke the Tucker Act jurisdiction of the Court of Federal Claims. *See* App. 13a. That decision directly conflicts with the D.C. Circuit's rule that a claim is subject to the Tucker Act jurisdiction of the Court of Federal Claims "if, in whole or in part, it explicitly or 'in essence' seeks more than $10,000 in monetary relief from the federal government." *Kidwell v. Dep't of the Army Bd. for Correction of Military Records*, 56 F.3d 279, 284 (D.C. Cir. 1995).

3. The Federal Circuit held that the exclusive appellate jurisdiction of the D.C. Circuit under the Act "preempts" the exclusive original jurisdiction of the Court of Federal Claims under the Tucker Act. App. 27 n.13. The court's decision on an important jurisdictional issue conflicts with this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) and ignores the "comprehensive framework" established by Congress in the Tucker Act and the Federal Courts Improvement Act. *See United States v. Hohri*, 482 U.S. 64, 73 (1987).

In *Steel*, this Court held that every federal appellate court has the threshold obligation to establish both its own jurisdiction and that of the lower court. *See* 523 U.S. at 94-96. Respondent argues that the Federal Circuit met that obligation simply by deeming Petitioners' "putative breach-of-contract action" to be subject to the D.C. Circuit's exclusive jurisdiction under § 402(b). Br. 12. That argument is based on the false premise that the D.C. Circuit's exclusive jurisdiction trumps the exclusive jurisdiction of the Court of Federal Claims and the Federal Circuit over nontort claims against the United States for more than $10,000. *See* 28 U.S.C. §§ 1295(a)(3), 1491(a)(1), 1346(a)(2); *Hohri*, 482 U.S. at 72.

Petitioners make the type of claims (breach of implied contract and takings claims) against the United States that are covered by the Tucker Act and they seek the specific relief ($144 million in damages) the Tucker Act provides. *See* App. 13a. Hence, they invoke the jurisdiction of the Court of Claims unless all their claims are clearly "frivolous or immaterial." *Steel*, 523 U.S. at 89-90. If their complaint succeeds in stating a single nonfrivolous claim against the government for more than $10,000 in damages, the D.C. Circuit's *Kidwell* rule applies, leaving that court without jurisdiction irrespective of § 402(b). *See* 56 F.3d at 284. Thus, the Federal Circuit was obliged under *Steel* to determine whether Petitioners present any claim cognizable under the Tucker Act.

4. A major concern of Congress in creating the Federal Circuit was the "special need for nationwide uniformity" in the adjudication of nontort claims against the United States. *Hohri*, 482 U.S. at 71. In order to "ensure that a central judicial body adjudicates most claims against the United States Treasury," *Kidwell*, 56 F.3d at 284, Congress created "exclusive Federal Circuit jurisdiction over *every appeal* from a Tucker Act or nontax Little Tucker Act claim." *Hohri*, 482 U.S. at 72-73 (emphasis in original). Given the "comprehensive framework" established by Congress and its "strong expressions of need for uniformity in the area," this Court adopted the presumption that if Congress intended that there be any exceptions to the Federal Circuit's exclusive Tucker Act jurisdiction, it would have made its intention "explicit, rather than left to inferences drawn from loose language." *Id.* 482 U.S. at 73.

Respondent asks this Court to draw the same type of jurisdictional inference that was rejected in *Hohri*. It argues the creation of a "comprehensive statutory and regulatory scheme" that directs "certain types of claims" to be litigated in the D.C. Circuit supports the inference that Congress has withdrawn Tucker Act jurisdiction "over those claims." Br. 16. However, the D.C. Circuit does not have exclusive jurisdiction over "certain types of claims." Under § 402(b), the D.C. Circuit has jurisdiction over appeals taken from

FCC "decisions and orders" in certain types of *cases*. *See* 47 U.S.C. § 402(b). It is the Tucker Act that affords the Court of Federal Claims exclusive jurisdiction over certain types of *claims* against the federal government. *See* 28 U.S.C. § 1491(a)(1). Moreover, the exclusive jurisdiction of the D.C. Circuit under § 402(b) is a judicial creation, *see* Br. 7-8, but Congress explicitly gave the Federal Circuit "exclusive jurisdiction ... of an appeal from a final decision of the ... Court of Federal Claims." 28 U.S.C. § 1295(a)(3). Under the rule that "a precisely, detailed statute preempts more general remedies," *Brown v. GSA*, 425 U.S. 820, 834 (1976), the jurisdiction given the Court of Federal Claims, and the exclusive jurisdiction expressly given the Federal Circuit, specifically over contract claims against the United States for more than $10,000, appears to trump whatever jurisdiction the D.C. Circuit could have over those claims as "ancillary" to the cases identified in § 402(b). Be that as it may, § 402(b) provides no basis to infer that Congress has withdrawn Tucker Act jurisdiction over Petitioners' breach-of-contract claims. *See* Pet. 22-25.

5. As a "special review statute," § 402(b) "cuts off" original jurisdiction in other courts in all cases it covers, *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979), but § 402(b) only covers final FCC decisions and orders. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Moreover, finality pursuant to the Administrative Procedure Act ("APA") is a "crucial pre-requisite" to ripeness for judicial review. *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003). But on August 8, 2001, when Petitioners filed suit, no final FCC decision or order existed that related to their claims. *See* App. 67a, 96a (¶ 94). As the trial court acknowledged, the D.C. Circuit could not have taken jurisdiction under § 402(b). *See id.* 67a. Under the "time-of-filing" rule,[5] the Court of Federal Claims unquestionably has exclusive jurisdiction to the extent Petitioners make nonfrivolous Tucker Act claims.

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[5] Subject-matter jurisdiction of the Court of Federal Claims turns on the facts as they exist when the complaint is filed. *See Keene Corp. v. United States*, 508 U.S. 200, 207-08 & n.3 (1993).

6. To invoke the D.C. Circuit's exclusive jurisdiction under § 402(b), a notice of appeal must be filed with the court "within thirty days from the date upon which public notice is given of the decision or order complained of." 47 U.S.C. § 402(c). The FCC never provided the notice necessary for its 1996 decision to become an "appealable decision" within the meaning of § 402(b). App. 29a n.14. Respondent does not dispute that the FCC's decision was "made off-the-record, never publicly acknowledged, and not subject to judicial review." Pet. 30. No decision or order was ever issued by the FCC or the WTB for the stated reason that the applications for the seven RSA licenses had in fact been denied in 1996 pursuant to an FCC decision not to hold relotteries.[6] Because judicial review of the reasonableness of an FCC licensing decision under § 402(b) is limited to the agency reasoning that appears in the FCC's order, *see, e.g., Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1336-37 (D.C. Cir. 2004), the FCC's 1996 decision was never subject to the D.C. Circuit's exclusive jurisdiction.

7. Respondent defends the determination below of the "true nature" of Petitioners' claims, but cannot articulate the legal standard the court employed. *See* Br. 9-10. The court's *ipse dixit* that Petitioners' "action plainly represents a challenge to the Commission's failure to hold relotteries" does not implicate the exclusive jurisdiction of the D.C. Circuit. App. 27a n.13. To fall within the D.C. Circuit's jurisdiction, a claim must be for the *same relief* § 402(b) provides. Thus, only a challenge to the lawfulness of an FCC order subject to review under § 402(b) must be made in the D.C. Circuit. *See Rochester*, 603 F.2d at 937. Petitioners

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[6] When it dismissed the RSA lottery applications in 1999, the WTB represented that it made the decision to dismiss the RSA lottery applications under its delegated authority, because the 1997 Budget Act had repealed the FCC's lottery authority. *See Dismissal Order*, 14 F.C.C.R. at 4620-21. It repeated that claim in 2001. *See Reconsideration Order*, 16 F.C.C.R. at 4861-62. So did the FCC when it finally reviewed the WTB's orders in 2002. *See Final Order*, 17 F.C.C.R. at 8510. The FCC never admitted that its decision not to hold relotteries was made *before* the 1997 Budget Act was enacted.

mount no such challenge.[7] Furthermore, only "adequate statutory review is exclusive." *Rochester*, 603 F.2d at 935. Since the FCC precluded adequate statutory review of its 1996 decision, Petitioners were entitled to pursue "any applicable form of legal action ... in a court of competent jurisdiction." 5 U.S.C. § 703.

8. Respondent contends that regulatory lotteries are not "properly analyzed" as implied-in-fact contracts, the breach of which subjects the agency to a suit for money damages. *See* Br. 13. However, Congress is presumed to have been aware that lotteries are contractual arrangements under the common law when it gave the FCC the option to use lotteries. *Cf., United States v. Texas*, 507 U.S. 529, 534 (1993). Yet, it took no steps to exempt the FCC from liability under the Tucker Act. Moreover, this Court has recognized that if an aggrieved party is able to establish the existence of an implied-in-fact contract with a federal agency, that party can bring suit under the Tucker Act. *See Kosak v. United States*, 465 U.S. 848, 860 n.22 (1984). Finally, ordinary contract principles apply to public contracts involving regulatory matters. *See United States v. Winstar Corp.*, 518 U.S. 839, 870-71 (1996).

9. Respondent concedes only that there may be a "consensus that recreational lotteries subject sponsor States to suit under contract principles." Br. 13. It is unclear what constitutes a "recreational" lottery, but it is the unanimous view of the many courts that have addressed the issue that principles of contract law apply to lotteries run by, or on

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[7] To decide if Petitioners' suit is covered by § 402(b), the Federal Circuit should have followed *Rochester*, since that case involved a district court action which the Federal Circuit viewed as "indistinguishable" from Petitioners' breach-of-contract suit. App. 25a. The plaintiffs in *Rochester* asked the court to set aside the FCC's grant of a construction permit, *see* 603 F.2d at 931, the very same relief § 402(b) provides. *See* 47 U.S.C. § 402(b)(6). In contrast, Petitioners' suit against the United States seeks money damages, a form of judicial relief that is not available under § 402(b). The suit also does not put the lawfulness of an FCC order at issue or ask that an FCC order be held "unlawful and set aside." 5 U.S.C. § 706(2).

behalf of, state governments. *See* Pet. 16-17 & n.16. Thus, under the law as it exists today, the general rules of contract law apply to government-run lotteries. Respondent and two federal courts below could not cite a single case from any jurisdiction to the contrary.

Framed by the same contract principles that courts have uniformly applied to lotteries, Petitioners' contract claims are not foreclosed by any precedent and cannot be dismissed as jurisdictionally frivolous. *See* Pet. 9-10, 16-17, 19. Respondent notes, however, that Petitioners do not cite to any authority specifically holding that principles of contract law apply to "lotteries conducted for regulatory purposes." Br. 13. Of course, Respondent cites no authority that exempts "regulatory" lotteries from the contract principles that are applied to all other lotteries. Evidently, the precise issue of whether contract principles govern federal agency-run lotteries is one of first impression. That issue is within the "unique expertise" of the Court of Federal Claims to address in the first instance. *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 78 (D.C. Cir. 1985).

10. Respondent argues that the FCC's authority to change its rules effectively precluded it from making a contractual promise to award RSA licenses by lotteries and prevented applicants from having a "reasonable" expectation that the FCC would be bound by its promise. Br. 13-16. However, the FCC's promise to hold lotteries in accordance with its lottery rules was (unsurprisingly) a promise to abide by those rules until amended or revoked. And the FCC was legally bound to do just that. *See* Pet. 11 n.11. By offering to hold lotteries under its rules in 1988, the FCC manifested its intention to be bound by its rules until they were changed pursuant to the APA. *See* 5 U.S.C. § 553. Because the FCC was "bound to adhere to its own rules and procedures," *Teleprompter Cable Communications Corp. v. FCC*, 565 F.2d 736, 742 (D.C. Cir. 1977), applicants had a "reasonable expectation" that the FCC would obey its lottery rules and procedures, and they were entitled to act in reliance on that expectation. *Gardner* v. *FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). When they did, implied contracts were formed.

Respectfully submitted,

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